

*United States Court of Appeals  
for the Second Circuit*



**SUPPLEMENTAL  
APPENDIX**



# ORIGINAL

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# 76-7313

IN THE  
United States Court of Appeals  
For the Second Circuit.

G & S DEVELOPMENT CORPORATION, FRANK J.  
GRESKOVICH and BENJAMIN L. STALNAKER,  
*Plaintiffs-Appellants,*  
*against*

LINCOLN FIRST REAL ESTATE CREDIT CORPO-  
RATION and NATIONAL BANK OF WESTCHES-  
TER,  
*Defendants-Appellees.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF NEW YORK.

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## SUPPLEMENTAL APPENDIX.

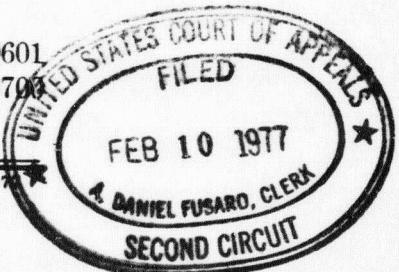
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THE REPORTER COMPANY, INC., New York, N. Y. 10007—212 732-6978—197

(774)



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ANSWER.

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

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G & S DEVELOPMENT CORP., FRANK J.  
GRESKOVICH and BENJAMIN L. STALNAKER,

Plaintiffs,

74 Civ. 2451

-against-

LINCOLN FIRST REAL ESTATE CREDIT  
CORP. and NATIONAL BANK OF WESTCHESTER,

A N S W E R

Defendants.

-----x

Defendants by their attorneys, McCarthy, Fingar, Donovan  
& Glatthaar, answering the complaint herein:

1. Deny that they have knowledge or information sufficient to form a belief as to the truth of any of the allegations contained in Paragraphs 2 and 3.

AS TO THOSE MATTERS ALLEGED AGAINST LINCOLN  
FIRST REAL ESTATE CREDIT CORP. (LINCOLN),  
SAID DEFENDANT:

2. Denies each and every allegation contained in Paragraph 8, except admits that negotiations between the agents of G&S Development Corp. (G&S) and Lincoln took place in the year 1973 and that R. W. Pollitt is Senior Vice President of Lincoln.

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ANSWER

3. Denies each and every allegation contained in Paragraph 9, except admits transmitting a letter of December 3, 1973 (Exhibit A to the complaint) and respectfully refers the Court to the terms of said letter for the exact meaning and the legal effect thereof.

4. Denies each and every allegation contained in Paragraph 10, except acknowledges receipt of a \$20,000 non-refundable fee from G&S.

5. Denies each and every allegation contained in Paragraph 12, except admits transmitting the letters annexed to the complaint as Exhibits B, C and D and respectfully refers the Court to the terms of said letters for the exact meaning and the legal effect thereof, and admits that Pollitt and Bergen are officers of Lincoln and that they caused said letters to be executed and transmitted.

6. Denies each and every allegation contained in Paragraph 13, except admits receipt of a \$160,000 non-refundable fee from G&S.

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ANSWER

7. Denies each and every allegation contained in Paragraph 14, except admits that Exhibit B to the complaint contains, inter alia, a condition subsequent: "3. Executive Loan Screening Committee approval".

8. Denies each and every allegation contained in Paragraph 15, except admits that defendant National Bank of Westchester (NBW) made a \$300,000, short-term loan to G&S evidenced by the promissory note of G&S which was guaranteed by plaintiffs Greskovich and Stalnaker, a copy of which note and the guarantees thereon are attached hereto and marked respectively Exhibits 1, 2 and 3.

9. Denies each and every allegation contained in Paragraph 16, except admits that G&S executed a note in favor of defendant NBW in the amount of \$300,000 (Exhibit 1), payment of which was personally guaranteed by plaintiffs Greskovich and Stalnaker (Exhibits 2 and 3), and further admits that defendant NBW advanced the sum of \$300,000 to G&S.

10. Denies each and every allegation contained in Paragraph 17, except admits that Pollitt had discussions with Crowe during 1974.

ANSWER

11. Denies each and every allegation contained in Paragraph 18, except admits that defendant Lincoln did not make the construction loan for which the plaintiffs had applied.

12. Denies each and every allegation contained in Paragraphs 19, 20, 22 and 23.

13. Denies that it has knowledge or information sufficient to form a belief as to the truth of any of the allegations contained in Paragraph 25.

14. Denies each and every allegation contained in Paragraph 26.

15. Denies that it has knowledge or information sufficient to form a belief as to the truth of any of the allegations contained in Paragraphs 28 and 29.

16. Denies each and every allegation contained in Paragraph 30.

17. Denies that it has knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 32.

ANSWER

18. Denies each and every allegation contained in Paragraphs 33 and 34.

19. Denies that it has knowledge or information sufficient to form a belief as to the truth of any of the allegations in Paragraphs 36 and 37.

20. Denies each and every allegation contained in Paragraphs 38 and 39.

AS TO THOSE CAUSES OF ACTION ALLEGED AGAINST  
DEFENDANT NATIONAL BANK OF WESTCHESTER (NBW),  
SAID DEFENDANT:

21. Denies the reallegations of Paragraphs 1 through 19, 25, 28, 29, 32, 33, 36, 37 and 38, as set forth in Paragraph 40, except to the extent that any of such allegations is admitted by the defendant Lincoln.

22. Denies so much of Paragraph 41 as alleges that Pollitt is a Vice President of NBW.

23. Denies each and every allegation of Paragraph 42, but admits that each defendant is a separate corporation governed by its own Board of Directors and that each is a wholly-owned subsidiary of Lincoln First Bank, Inc.

ANSWER

24. Denies each and every allegation contained in Paragraphs 43, 44, 45 and 46.

AS A FIRST SEPARATE AND COMPLETE DEFENSE,  
BOTH DEFENDANTS ALLEGE:

25. The complaint fails to state a claim upon which relief can be granted.

AS A SECOND SEPARATE AND COMPLETE  
DEFENSE, DEFENDANT LINCOLN ALLEGES:

26. Lincoln's acceptance of plaintiffs' application for a construction loan was conditioned upon the happening of a variety of events subsequent to the acceptance of said application, which conditions are specifically outlined and detailed in Exhibits A, B, C and D to the complaint, to which exhibits the Court is respectfully referred.

27. Among the stated conditions which were not fulfilled were the approval of the loan by Lincoln's Executive Loan Screening Committee, the agreement of participating banks to participate in the loan, and the execution by such banks of a Participation and Service Agreement satisfactory to Lincoln.

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ANSWER

28. In addition to the above conditions, the defendant Lincoln notified plaintiffs, on and after January 15, 1974, that Lincoln's Loan Screening Committee had not approved the construction loan on the terms applied for, and had given approval of such loan only upon the condition that the said loan be subject to a separate Take-Out Agreement to be made to plaintiffs by a financially responsible lending institution approved by and satisfactory to Lincoln.

29. Plaintiffs did not enter into and were unable to provide to Lincoln such a separate Take-Out Agreement, and the conditions of the approval of such loan by the Loan Screening Committee were never fulfilled.

AS A THIRD SEPARATE AND AFFIRMATIVE DEFENSE,  
DEFENDANT LINCOLN ALLEGES:

30. By the terms of Exhibit B attached to the complaint herein, the qualified acceptance of Lincoln was to expire on April 1, 1974 if the transaction had not closed by that date.

31. The plaintiffs were unable to meet the conditions of the defendant Lincoln's qualified acceptance and the loan transaction did not close by April 1, 1974.

ANSWER

AS A FOURTH SEPARATE AND AFFIRMATIVE DEFENSE,  
DEFENDANT LINCOLN ALLEGES:

32. The qualified acceptance by Lincoln of plaintiff's application for a permanent loan, evidenced by Exhibit C, contained in it a number of conditions subsequent to the granting of said qualified acceptance. The Court is respectfully referred to said Exhibit for the precise terms thereof.

33. Among the conditions of the qualified acceptance of the permanent mortgage loan, Exhibit C states specifically that said permanent mortgage loan "shall be null and void if the loan transaction is not closed on or before the expiration of our construction loan..." and further that "if the construction loan committed for simultaneously herewith is not closed pursuant to its terms, this commitment shall automatically terminate and have no further force and effect".

34. Because of the inability of plaintiffs to satisfy the conditions of the construction loan, the construction loan was not closed pursuant to its terms and the commitment for the permanent loan automatically terminated.

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ANSWER

AS A FIFTH SEPARATE AND AFFIRMATIVE DEFENSE,  
DEFENDANT LINCOLN ALLEGES:

35. Under the stated terms contained in Exhibits A, B, C and D, plaintiffs became obligated to pay to Lincoln a non-refundable fee of \$180,000, it being understood between the parties that the said \$180,000 was the reasonable pre-estimation by the parties of the damages which would accrue to Lincoln in the event that, for any reason, plaintiff's application for a loan failed to close.

AS AND FOR A COUNTERCLAIM ON BEHALF OF  
THE DEFENDANT LINCOLN AGAINST THE  
PLAINTIFF G&S:

36. On or about December 31, 1973, the plaintiff G&S, in consideration of the receipt of \$300,000, executed a promissory note in that amount, payable in 60 days, to the order of NBW, a copy of which note is annexed as Exhibit 1.

37. Thereafter and at or about the date of maturity of the aforesaid note, G&S caused to be paid to NBW the sum of \$50,000 in reduction of the principal amount of G&S's obligation therein.

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ANSWER

38. Thereafter, after the maturity of said note and on or about April 19, 1974, NBW made written demand on G&S (a copy of which is annexed as Exhibit 4), for the payment in full of its obligation on the note on April 25, 1974 in the stated amount of \$256,911.46, but the plaintiff G&S failed and refused and still refuses to make payment thereon in any amount.

39. On or about June 20, 1974, pursuant to prior agreement between the defendants, the defendant Lincoln purchased from the defendant NBW, at a price of \$262,258.69, the promissory note of G&S and acquired from NBW, by endorsement and assignment, all of NBW's right, title and interest in such note.

40. There is now due and owing by the plaintiff G&S to the defendant Lincoln on the aforesaid note, the sum of \$262,258.96, with interest from June 20, 1974.

AS AND FOR A COUNTERCLAIM OF THE DEFENDANT LINCOLN AGAINST THE PLAINTIFFS GRESKOVICH AND STALNAKER, THE DEFENDANT LINCOLN ALLEGES:

41. The allegations of Paragraphs 35 through 39 are realleged as if set forth fully again.

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ANSWER

42. On or about December 31, 1973, the plaintiffs Greskovich and Stalnaker executed and delivered to the defendant NBW their separate, individual guarantees of the obligations of G&S Development Corp. in writing. A copy of the plaintiff Greskovich's guaranty, together with the documentation of the power of attorney under which it was executed, is annexed as Exhibit 2, and a copy of the plaintiff Stalnaker's guaranty is annexed as Exhibit 3.

43. On or about April 19, 1974, the defendant NBW gave written notice to the plaintiff's Greskovich and Stalnaker of the non-payment by G&S of its promissory note at maturity and the demand for payment by April 24, 1974, as shown in Exhibit 4, previously referred to, and thereby notified the plaintiffs Greskovich and Stalnaker of the personal liability of each plaintiff as a guarantor of the obligations of G&S, but the plaintiffs Greskovich and Stalnaker have not paid or discharged any part of the indebtedness then stated in the amount of \$256,911.46.

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ANSWER

44. By operation of law and by the specific terms of each guaranty executed by the plaintiffs Greskovich and Stalnaker, the defendant Lincoln is entitled to the security of each plaintiff's guaranty of the obligations of the plaintiff G&S under the aforesaid note, and the plaintiffs are jointly and severally liable to the defendant Lincoln, as holder of the note, in the amount of \$262,258.69 with interest from June 20, 1974.

WHEREFORE, defendants demand judgment against the plaintiffs dismissing the complaint herein, and defendant Lincoln demands judgment on its counterclaims against plaintiffs in the amount of \$262,258.69 with interest thereon from June 20, 1974, together with the costs and disbursements of this action, and such other and further relief as may be just and proper.

Dated: White Plains, N.Y.  
July 1, 1974.

McCARTHY, FINGAR, DONOVAN & GLATTHAAR

By: R. McCarthy

A Member of the Firm  
Attorneys for Defendants  
175 Main Street  
White Plains, New York 10601  
(914) 946-3700

BEST COPY AVAILABLE

13a

EXHIBIT 1, ANNEXED TO ANSWER.  
PROMISSORY NOTE

300,000.00

WHITE PLAINS N.Y. 12-31-1973  
(City or Town)

FOR VALUE RECEIVED.....

60 days

.....after date the undersigned (jointly and severally if more than one) promises to pay to the  
order of NATIONAL BANK OF WESTCHESTER, (hereinafter called the Bank), at its .....

office, the sum of THREE HUNDRED THOUSAND \$300,000.00 - - - - -

(\$300,000.00) Dollars, with interest thereon at the rate herein set forth. Should any payment of interest to be made hereunder, or of principal  
when due by acceleration or upon maturity remain unpaid for more than fifteen (15) days after its due date hereunder, the undersigned further promises to pay to the Bank  
a late charge amounting to one (1%) per cent of the payment so in arrears or \$5.00 whichever is greater. The undersigned further promises to pay to the Bank  
the actual expenditures, including attorney's fees of twenty (20%) per cent of the unpaid balance of this note, should legal proceedings be instituted to collect any  
amount due hereon.

The undersigned shall maintain a regular checking account with the Bank on its customary terms.

As collateral security for the payment of this note and of any and all other obligations and liabilities of any of the undersigned to the Bank, whether  
due or to become due, direct or contingent, now existing or hereafter arising, and however, created or acquired, the Bank shall at all times have and is hereby given  
a security interest in and a lien upon any right of offset against all money, deposit balances, securities or other property or interest therein of any of the undersigned  
and any endorser or guarantor now or at any time hereafter held or received by or for or left in the possession or control of the Bank, whether for safekeeping,  
custody, transmission, or collection, pledge or for any other or different purpose.

If, with respect to any of the undersigned and any endorser or guarantor of this note, any of the following events shall occur, this note and all other  
obligations now or hereafter existing of the undersigned and any endorser or guarantor of this note shall, at the option of the Bank, become immediately due and  
payable without demand or notice, viz: failure to pay any amount as herein agreed; insolvency; failure in business or material impairment of ability to meet  
financial obligations; making or offering to make or the commencement of any proceeding for reorganization, composition, arrangement, or receivership; default in  
payment or performance of any other obligation to the Bank; dissolution or termination of existence; commission of any act of bankruptcy; any of the events specified  
in Section 131 of the Debtor and Creditor Law of New York; the making or sending notice of an intended bulk sale or transfer; the failure to pay any tax or the  
making of a tax assessment by any of the tax authorities; the making of a misrepresentation to the Bank for the purpose of obtaining credit; failure after demand to  
submit financial information or permit inspection of records; the entry of any judgment; the granting of a security interest as defined in the Uniform Commercial  
Code of New York in any personal property (other than to secure part of the purchase price) or if at any time in the sole opinion of the Bank, the financial responsibility  
of the undersigned, or any endorser or guarantor shall become unsatisfactory to the Bank, and, at any time thereafter, the Bank may sell, assign and deliver  
the whole, or from time to time any part, of the property upon which it is given a lien hereunder at any Broker's Board, or at public or private sale, at such prices  
as it may deem best, either for cash or on credit or for future delivery, at the option of the Bank, without either demand, advertisement or notice of any kind all of  
which are hereby expressly waived, and with the right to the Bank to purchase all or any part of the property sold, free from any right of redemption.

In the event of any such sale, the Bank may apply the proceeds thereof, after deduction of all costs and expenses of every kind, to or toward the payment  
of either the principal or interest of any one or more of the obligations and liabilities aforesaid, including this note, whether then due or not due, in such proportions  
and in such sequence or order as the Bank in its sole discretion may determine, returning the surplus, if any, to any of the undersigned; all without prejudice to the  
rights of the Bank as against any of the undersigned, and any endorser or guarantor with respect to any and all amounts which may be or remain unpaid on this note  
and on any of the other obligations and liabilities aforesaid at any time.

The Bank may also at its option, at any time, either before or after the maturity of this note, with or without notice and with like discretion as to the  
order of application, appropriate and apply to the payment or reduction of the amount, either in whole or in part then owing on any or all of the obligations and  
liabilities aforesaid, including this note, any or all deposit balances and any sums at any time credited by or due from the Bank to any one or more of the undersigned  
or any endorser or guarantor. The Bank, however, shall not be obligated to assert or enforce any rights or liens hereunder or to take any action whatever  
in regard thereto.

Each of the undersigned and each endorser and guarantor hereby waives presentment, demand for payment, notice of dishonor and any and all other  
notices and demands in connection with the delivery, acceptance, performance, default or enforcement of this note and hereby consents to any and all extensions of  
time, renewals, releases of liens, waivers or modifications, release of any party or exchange or release of any collateral that may be made or granted by the Bank to  
any party hereto, and in any litigation in which the Bank shall be an adverse party, hereby waives trial by jury and the right to interpose any defense, set-off or  
counterclaim. No delay by the Bank in exercising any power or right hereunder shall operate as a waiver of any power or right; nor shall any single or partial  
exercise of any power or right preclude other or further exercise thereof, or the exercise of any other power or right hereunder; and no waiver whatever or modification  
of the terms hereof shall be valid unless in writing signed by the Bank and then only to the extent therein set forth.

The Bank is hereby authorized, without further notice, to: (a) date this note as of the date when the loan is made; (b) fill in any blank spaces according  
to the terms upon which it grants the loan relative thereto; (c) cause or permit one or more co-makers to be added, released or withdrawn as parties hereto,  
either before or after the making of the loan; and (d) return the note when paid to any of the signers thereof. All of the rights and powers of the Bank as provided  
in this note are also for the benefit of and apply to any subsequent holder of this note in the event of an assignment or transfer. This note shall be construed in  
accordance with the laws of the State of New York.

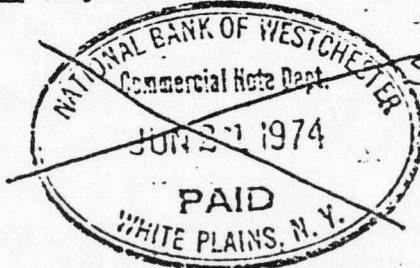
Interest shall be charged at the rate of  $\frac{1}{2} + 4\%$  per annum payable:

Discounted  
 Add On

Interest Payment:  Charge Acct. No.

Bill

APPROVED



STAMPED IN  
ERROR  
DHD

G & S Development Corp.  
(Corporation Name)  
By... Richard J. Caruso Jr.  
In Person  
John J. Packer III  
Vice President  
253 Broadway  
N.Y. N.Y. 10007  
(Address)

NOTE NO.	BRANCH	TRANS.	TYPE	DAYS
P/R	PR. RATE	INTEREST	MATURITY	INT. PAY
13-69	2	ARW	C	60
13-75		\$5,875.00	3-1-74	

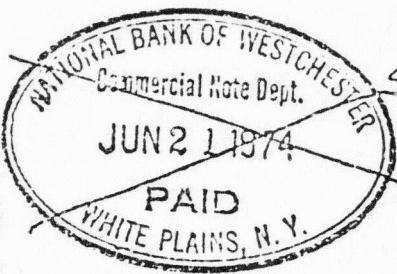
G & S Development Corp.  
253 Broadway  
N.Y. N.Y. 10007

## EXHIBIT 1, ANNEXED TO ANSWER

to the order of  
 coln First Real Estate Credit Corporation  
 ional Bank of Westchester

Stanley C. Ackemann  
 tanley C. Ackemann, Vice President

As an inducement to the Bank to extend the financial accommodation evidenced by this note and in consideration of the loan made upon this note, and for other good and valuable consideration, the undersigned (jointly and severally if more than one) hereby consent to all the terms and conditions of this note and unconditionally guarantee to NATIONAL BANK OF WESTCHESTER and every subsequent holder of this note, irrespective of the genuineness, validity, regularity, or enforceability thereof, or of any collateral therefor, that all sums stated therein to be payable on this note shall be promptly paid in full, at maturity or by acceleration and in case of any extension of time of payment or renewal in whole or in part, all sums shall be promptly paid when due, according to such extension or renewal, at maturity or by acceleration, and hereby consent to any and all extensions of time, renewals, waivers, changes in rate of interest or other modifications that may be granted with respect to the payment or other provisions of this note and hereby consent to the release of collateral or any part thereof with or without substitution and agree that additional makers, endorsers, guarantors or sureties may become parties hereto without notice to them and without affecting their liability hereunder. The signature or signatures of the undersigned hereto are intended as an endorsement of the within note as well as the execution of the foregoing guarantee by each of the undersigned who each hereby waive presentment, demand for payment, protest, and notice of non-payment, dishonor or protest.



STAMPED  
IN ERROR  
PAB

## EXHIBIT 1, ANNEXED TO ANSWER

NATIONAL BANK OF WESTCHESTER  
AFFIDAVIT

June 21, 1974

To Whom It May Concern:

The attached note of G & S Development Corporation dated December 31, 1973, in the amount of \$300,000 due March 1, 1974 was stamped paid by me in error. The note was purchased by Lincoln First Real Estate Credit Corporation on June 20, 1974 for \$262,258.69.

Principal balance due	\$ 250,000.00
Interest due @ 13 3/4% through 6-20-74	9,758.69
Late Charge	2,500.00
<hr/>	
TOTAL:	\$ 262,258.69

The note is still in full force and effect.

Patricia A. Simons  
Patricia A. Simons  
(Note Clerk)

STATE OF

COUNTY OF

On this 21st day of June, 1974, before me came Patricia A. Simons to me known to be the individual who executed the foregoing instrument, and she duly acknowledged to me that she executed the same.

KATHRYN L. PIGNATARO  
Notary Public, State of New York  
No. 60-9821328  
Qualified in Westchester County  
Commission Expires March 30, 1976

Kathryn L. Pignataro  
Notary Public

## EXHIBIT 2, ANNEXED TO ANSWER.

Guaranty

New York, Dec. 31, 1973

National Bank of Westchester  
31 Mamaroneck Avenue  
White Plains, New York

1. For valuable considerations the receipt whereof by the undersigned is hereby acknowledged, and to induce NATIONAL BANK OF WESTCHESTER, (hereinafter with its successors and assigns, referred to as the "Bank"), at its option, at any time or from time to time, to extend financial accommodation, with or without security to or for account of \_\_\_\_\_

G & S Development Corp.

(hereinafter referred to as the "Borrower"), or in respect of which the Borrower may be liable in any capacity (the term "financial accommodation" including, without limitation, extension of loans, credit or accommodation, or discount or purchase of, or loans on, commercial paper, accounts receivable or other property, or entering into exchange contracts), the undersigned (if more than one jointly and severally) hereby unconditionally guarantee(s) to the Bank, irrespective of the validity, regularity or enforceability of any instrument, writing or arrangement relating to any such financial accommodation (each such instrument, writing or arrangement being hereinafter referred to as, and included in the term, "Credit Arrangement") or of the obligations thereunder and irrespective of any present or future law or order of any government (whether of right or in fact) or of any agency thereof purporting to reduce, amend or otherwise affect any obligation of the Borrower or to vary the terms of payment, that the Borrower will promptly perform and observe every agreement and condition in any Credit Arrangement to be performed or observed by the Borrower, that all sums stated to be payable in, or which become payable under, any Credit Arrangement, and all other sums which may be owing by the Borrower to the Bank now or hereafter, will be promptly paid in full when due, whether at maturity or earlier by reason of acceleration or otherwise, or, if now due, when payment thereof shall be demanded by the Bank, together with interest and any and all legal and other costs and expenses paid or incurred in connection therewith by the Bank, and, in case of one or more extensions of time of payment or renewals, in whole or in part, of any Credit Arrangement or obligation, that the same will be promptly paid or performed when due, according to each such extension or renewal, whether at maturity or earlier by reason of acceleration or otherwise.

In the event that the Borrower is a partnership, the term "Credit Arrangement" as used herein shall include all credit arrangements of any successor partnership or partnerships to the Bank, direct or contingent, joint, several or independent, now or hereafter existing, due or to become due to, or held or to be held by, the Bank, whether created directly or acquired by assignment or otherwise.

The undersigned hereby consent(s) that from time to time, without notice to or further consent of the undersigned, the performance or observance by the Borrower of any of said agreements or conditions may be waived or the time of performance thereof extended by the Bank, and payment of any obligation hereby guaranteed may be accelerated in accordance with any agreement between the Bank and any party liable with respect thereto, or may be extended, or any Credit Arrangement may be renewed in whole or in part or any collateral may be exchanged, surrendered or otherwise dealt with as the Bank may determine, and any of the acts mentioned in any Credit Arrangement may be done, all without affecting the liability of the undersigned hereunder. The undersigned hereby waive(s) presentation of any instrument, demand of payment, protest and notice of non-payment or protest thereof or of any exchange, sale, surrender or other handling or disposition of collateral.

## EXHIBIT 2, ANNEXED TO ANSWER

2. As security for obligations of the undersigned hereunder, the undersigned hereby pledge(s) to the Bank and gives it a general lien upon and/or right of set-off of the balance of every deposit account, now or at any time hereafter existing, of the undersigned with the Bank and any other claim of the undersigned against the Bank, and any other property, rights and interests, of the undersigned, or any evidence thereof, which have been or at any time shall be delivered to or otherwise come into possession, custody, or control of the Bank or anyone else for the Bank, and in the event of a default under this guaranty, the Bank may sell or cause to be sold in the City of White Plains, County of Westchester, or elsewhere, in one or more sales or parcels, at such price or prices as the Bank may deem best, and either for cash or on credit (without assuming any responsibility for credit risk) or for future delivery, all or any of the security for the obligations of the undersigned hereunder, at any broker's board or at public or private sale, without demand of performance or notice of intention to sell or of time or place of sale, and the Bank or anyone else may be the purchaser of any or all property, rights and/or interests sold and thereafter hold the same absolutely, free from any claim or right of whatsoever kind, including any equity of redemption, of the undersigned, any such demand, notice, or right and equity being hereby expressly waived and released.

3. (A) This guaranty shall continue in full force and be binding upon the undersigned and the estate (or, if more than one, the estates) of the undersigned notwithstanding the death of any of the undersigned or any guarantor or any other party liable upon or in respect of any obligation hereby guaranteed; any one or more of the undersigned (if more than one), or any other party liable upon or in respect of any obligation hereby guaranteed, may be released without affecting the liability of any of the undersigned not so released; and the Bank may continue to act in reliance hereon until the receipt by the Bank of written notice from the undersigned, or, in the event of the death of any of the undersigned, from the legal representative or representatives of such decedent or decedents, not to give further accommodation in reliance hereon.

The undersigned agree(s) that whenever at any time or from time to time it shall make any payment to the Bank hereunder on account of the liability of the undersigned hereunder, the undersigned will notify the Bank in writing that such payment is made under this guaranty for such purpose. No payment by the undersigned pursuant to any provision hereof shall entitle the undersigned, by subrogation to the rights of the Bank or otherwise, to any payment by the Borrower or out of the property of the Borrower, except after payment in full of all sums (including said costs, expenses and interest) which may be or become payable by the Borrower to the Bank at any time or from time to time.

4. Upon the happening of any of the following events: the death or insolvency of the Borrower or the undersigned, or failure of the undersigned to deposit such collateral as may be demanded by the Bank, or suspension of business of the Borrower or the undersigned, or the issuance of any warrant of attachment against any of the property of the Borrower or the undersigned, or the making by the Borrower or the undersigned of an assignment for the benefit of creditors, or a trustee or receiver being appointed for the Borrower or the undersigned or for any property of either of them, or any proceeding being commenced by or against the Borrower or the undersigned under any bankruptcy, reorganization, arrangement of debt, insolvency, readjustment of debt, receivership, liquidation or dissolution law or statute, — then and in such event, and at any time thereafter, the Bank may, without notice to the Borrower or the undersigned, make the liabilities of the Borrower to the Bank, whether or not then due, immediately due and payable hereunder as to the undersigned, and the Bank shall be entitled to enforce the obligations of the undersigned hereunder.

5. The Bank may assign this instrument or any of its rights and powers hereunder, with all or any of the obligations hereby guaranteed, and may assign and/or deliver to any such assignee any of the security herefor and, in the event of such assignment, the assignee hereof or of such rights and powers and of such security, if any of such security be so assigned and/or delivered, shall have the same rights and remedies as if originally named herein in place of the Bank, and the Bank shall be thereafter fully discharged from all responsibility with respect to any such security so assigned and/or delivered.

## EXHIBIT 2, ANNEXED TO ANSWER

6. Notice of acceptance of this guaranty and of the incurring of any and all of the obligations of the Borrower hereinbefore mentioned is hereby waived. All of the provisions hereof regarding the security of the undersigned shall apply to the security of any or all of them, if there be more than one of the undersigned. This guaranty and all rights, obligations and liabilities arising hereunder shall be construed according to the laws of the State of New York.

IN WITNESS WHEREOF, this instrument has been duly executed and sealed by the undersigned the day and year first above written.

Frank J. Greskovich (L.S.)

Richard H. Crowe Jr. (L.S.)

President to P.P. dated 1-6-74,

copy attached.

{ ss.

STATE OF

COUNTY OF

On this 27th day of December, 1973, before me came Richard H. Crowe, Jr. as Power of Attorney for Frank J. Greskovich to me known to be the individual(s) described in and who executed the foregoing instrument, and he duly acknowledged to me that he executed the same.

KATHRYN L. DADDAZIO  
Notary Public, State of New York  
No. 60-0521323  
Qualified in Westchester County  
Commission Expires March 30, 1974

STATE OF NEW YORK

COUNTY OF

{ ss.:

Kathryn L. Daddazio  
Notary Public

(Mrs. Rignataro)

On the \_\_\_\_\_ day of \_\_\_\_\_ 19\_\_\_\_\_, before me personally came \_\_\_\_\_ to me known, who, being by me duly sworn, did depose and say that he resides at No. \_\_\_\_\_ that

he is the \_\_\_\_\_ of \_\_\_\_\_, the corporation described in and which executed the foregoing instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of the board of directors of said corporation, and that he signed his name thereto by like order.

\_\_\_\_\_  
Notary Public

## EXHIBIT 2, ANNEXED TO ANSWER

## AFFIDAVIT AS TO POWER OF ATTORNEY BEING IN FULL FORCE

STATE OF NEW YORK )  
:SS.:  
COUNTY OF NEW YORK )

RICHARD H. CROWE, JR., being duly sworn, deposes  
and says:

THAT FRANK J. GRESKOVICH as principal, who resides at  
5120 Bayou Boulevard, Pensacola, Florida did, in writing,  
under date of January 6th, 1972 appoint me his true and  
lawful attorney, and that annexed hereto, and hereby  
made a part hereof, is a true copy of said power of  
attorney.

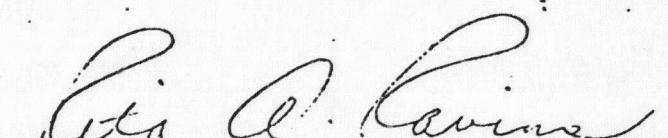
THAT I hereby represent that the said principal is  
now alive; that he is now of sound mind; that he has  
not, at any time, revoked or repudiated the said  
power of attorney; and that the said power of attorney  
still is in full force and effect.

  
Richard H. Crowe, Jr.

SWORN TO BEFORE ME

this 28th day of December, 1973.

Notarial  
Seal

  
Rita A. Pavins  
Notary Public

RITA A. PAVINS  
NOTARY PUBLIC, State of New York  
No. 24-3214550 - Qual. in Kings Co.  
Certificate Filed in New York County  
Commission Expires March 30, 1974

## EXHIBIT 2, ANNEXED TO ANSWER

*I, Frank J. Greskovich, do hereby select by these presents,*

That I, FRANK J. GRESKOVICH as principal  
 residing at 5120 Bayou Boulevard, Pensacola, Florida  
 do hereby constitute and appoint, RICHARD H. CROWE, JR.  
 residing at 253 Broadway, New York, New York 10007  
 my true and lawful attorney for me, and in my name, place and stead,

(a) To enter upon and take possession of any lands, tenements and hereditaments that may belong to me, or to the possession of which I may be entitled;

(b) To ask, collect and receive any rents, profits, issues or income of any and all of such lands, tenements and hereditaments, or of any part or parts thereof;

(c) To pay any and all taxes, charges and assessments that may be levied, assessed or imposed upon any of my lands, buildings, tenements or other structures;

(d) To make, execute and deliver any deed, mortgage or lease, whether with or without covenants and warranties, in respect of any such lands, tenements and hereditaments, or of any part or parts thereof, and to manage, repair, rebuild or reconstruct any buildings, houses or other structures or any part or parts thereof, that may now or hereafter be erected upon any such lands;

(e) To extend, renew, replace or increase any mortgage or mortgages now or hereafter affecting any of my lands, tenements and hereditaments and/or any personal property belonging to me, and, for any such purposes, to sign, seal, acknowledge and deliver any bond or bonds, or to make, sign and deliver any note or notes, or any extension, renewal, consolidation or apportionment agreement or agreements, or any other instrument, whether sealed or unsealed, that may be useful or necessary to accomplish any of the foregoing purposes;

(f) To obtain insurance of any kind, nature or description whatsoever, on any of my lands, tenements and hereditaments and/or in connection with the management, use or occupation thereof and/or on any personal property belonging to me and/or in respect of the rents, issues and profits arising therefrom, and to make, execute and file proof or proofs of all loss or losses sustained or claimable thereunder, and all other instruments in and about the same, and to make, execute and deliver receipts, releases or other discharges therefor, under seal or otherwise.

(g) To demand, sue for, collect, recover and receive all goods, claims, debts, monies, interests and demands whatsoever now due, or that may hereafter be due or belong to me (including the right to institute any action, suit or legal proceeding for the recovery of any land, buildings, tenements or other structures, or any part or parts thereof, to the possession whereof I may be entitled) and to make, execute and deliver receipts, releases or other discharges therefor, under seal or otherwise;

(h) To make, execute, endorse, accept, collect and deliver any or all bills of exchange, checks, drafts, notes and trade acceptances;

## EXHIBIT 2, ANNEXED TO ANSWER

(i) To pay all sums of money at any time or times, that may hereafter be owing by me upon any bill of exchange, check, draft, note or trade acceptance, made, executed, endorsed, accepted and delivered by me, or for me, and in my name, by my said attorney;

(j) To sell, mortgage or hypothecate any and all shares of stock, bonds or other securities now or hereafter belonging to me, and to make, execute and deliver an assignment or assignments of any such shares of stock, bonds or other securities, either absolutely or as collateral security;

(k) To defend, settle, adjust, compound, submit to arbitration and compromise all actions, suits, accounts, reckonings, claimis and demands whatsoever that now are, or hereafter shall be, pending between me and any person, firm, association or corporation, in such manner and in all respects as my said attorney shall think fit;

(l) To file any proof of debt, or take any other proceedings, under the Bankruptcy Act, or under any law of any state or territory of the United States, in connection with any such claim, debt, money or demand, and, in any such proceeding or proceedings, to vote in the election of any trustee or trustees, or assignee or assignees, and to demand, receive and accept any dividend or dividends, or distribution or distributions that may be or become payable therein or thereunder;

(m) To hire accountants, attorneys at law, clerks, workmen and others, and to remove them, and appoint others in their place, and to pay and allow to the persons to be so employed such salaries, wages or other remunerations, as my said attorney shall think fit;

(n) To constitute and appoint, in his place and stead, and as his substitute, one attorney or more, for me, with full power of revocation, and

Without in any wise limiting the foregoing, generally to do, execute and perform any other act, deed, matter or thing whatsoever, that ought to be done, executed and performed, or that, in the opinion of my said attorney ought to be done, executed or performed in and about the premises, of every nature and kind whatsoever, as fully effectual as I could do if personally present.

And I do hereby ratify and confirm all whatsoever that my said attorney or his substitute or substitutes, shall do, or cause to be done, in or about the premises, by virtue of this power of attorney.

This instrument may not be changed orally.

In Witness Whereof, I have hereunto set my hand and seal the 6th  
day of January 19 72

WITNESS:

Jamie Didik  
Jamie Didik

F.J. Greskovich, D.D.S.  
Frank J. Greskovich

Maryann E. Horneck  
Maryann E. Horneck

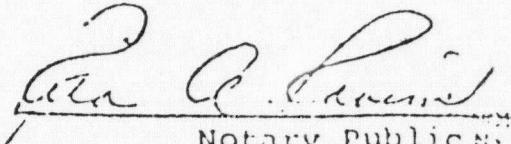
## EXHIBIT 2, ANNEXED TO ANSWER

STATE OF NEW YORK  
COUNTY OF NEW YORK }  
                          } ss.

On the 6th day of January 1972 before me personally came  
FRANK J. GRESKOVICH

to me known, and known to me to be the individual described in, and who executed the foregoing instrument, and he acknowledged to me that he executed the same.

Notarial  
Seal

  
RITA A. SAVINS  
Notary Public No. 24-301473 State of New York  
Certificate No. 100-10000-1  
Commission Expires March 2001

## EXHIBIT 3, ANNEXED TO ANSWER.

*G & S*

New York DEC 31, 1973

National Bank of Westchester  
31 Mamaroneck Avenue  
White Plains, New York

1. For valuable considerations the receipt whereof by the undersigned is hereby acknowledged, and to induce NATIONAL BANK OF WESTCHESTER, (hereinafter with its successors and assigns, referred to as the "Bank"), at its option, at any time or from time to time, to extend financial accommodation, with or without security to or for account of \_\_\_\_\_

G & S DEVELOPMENT CORP.

(hereinafter referred to as the "Borrower"), or in respect of which the Borrower may be liable in any capacity (the term "financial accommodation" including, without limitation, extension of loans, credit or accommodation, or discount or purchase of, or loans on, commercial paper, accounts receivable or other property, or entering into exchange contracts), the undersigned (if more than one jointly and severally) hereby unconditionally guarantee(s) to the Bank, irrespective of the validity, regularity or enforceability of any instrument, writing or arrangement relating to any such financial accommodation (each such instrument, writing or arrangement being hereinafter referred to as, and included in the term, "Credit Arrangement") or of the obligations thereunder and irrespective of any present or future law or order of any government (whether of right or in fact) or of any agency thereof purporting to reduce, amend or otherwise affect any obligation of the Borrower or to vary the terms of payment, that the Borrower will promptly perform and observe every agreement and condition in any Credit Arrangement to be performed or observed by the Borrower, that all sums stated to be payable in, or which become payable under, any Credit Arrangement, and all other sums which may be owing by the Borrower to the Bank now or hereafter, will be promptly paid in full when due, whether at maturity or earlier by reason of acceleration or otherwise, or, if now due, when payment thereof shall be demanded by the Bank, together with interest and any and all legal and other costs and expenses paid or incurred in connection therewith by the Bank, and, in case of one or more extensions of time of payment or renewals, in whole or in part, of any Credit Arrangement or obligation, that the same will be promptly paid or performed when due, according to each such extension or renewal, whether at maturity or earlier by reason of acceleration or otherwise.

In the event that the Borrower is a partnership, the term "Credit Arrangement" as used herein shall include all credit arrangements of any successor partnership or partnerships to the Bank, direct or contingent, joint, several or independent, now or hereafter existing, due or to become due to, or held or to be held by, the Bank, whether created directly or acquired by assignment or otherwise.

The undersigned hereby consent(s) that from time to time, without notice to or further consent of the undersigned, the performance or observance by the Borrower of any of said agreements or conditions may be waived or the time of performance thereof extended by the Bank, and payment of any obligation hereby guaranteed may be accelerated in accordance with any agreement between the Bank and any party liable with respect thereto, or may be extended, or any Credit Arrangement may be renewed in whole or in part or any collateral may be exchanged, surrendered or otherwise dealt with as the Bank may determine, and any of the acts mentioned in any Credit Arrangement may be done, all without affecting the liability of the undersigned hereunder. The undersigned hereby waive(s) presentation of any instrument, demand of payment, protest and notice of non-payment or protest thereof or of any exchange, sale, surrender or other handling or disposition of collateral.

## EXHIBIT 3, ANNEXED TO ANSWER

2. As security for obligations of the undersigned hereunder, the undersigned hereby pledge(s) to the Bank and gives it a general lien upon and/or right of set-off of the balance of every deposit account, now or at any time hereafter existing, of the undersigned with the Bank and any other claim of the undersigned against the Bank, and any other property, rights and interests, of the undersigned, or any evidence thereof, which have been or at any time shall be delivered to or otherwise come into possession, custody, or control of the Bank or anyone else for the Bank, and in the event of a default under this guaranty, the Bank may sell or cause to be sold in the City of White Plains, County of Westchester, or elsewhere, in one or more sales or parcels, at such price or prices as the Bank may deem best, and either for cash or on credit (without assuming any responsibility for credit risk) or for future delivery, all or any of the security for the obligations of the undersigned hereunder, at any broker's board or at public or private sale, without demand of performance or notice of intention to sell or of time or place of sale, and the Bank or anyone else may be the purchaser of any or all property, rights and/or interests sold and thereafter hold the same absolutely, free from any claim or right of whatsoever kind, including any equity of redemption, of the undersigned, any such demand, notice, or right and equity being hereby expressly waived and released.

3. (A) This guaranty shall continue in full force and be binding upon the undersigned and the estate (or, if more than one, the estates) of the undersigned notwithstanding the death of any of the undersigned or any guarantor or any other party liable upon or in respect of any obligation hereby guaranteed; any one or more of the undersigned (if more than one), or any other party liable upon or in respect of any obligation hereby guaranteed, may be released without affecting the liability of any of the undersigned not so released; and the Bank may continue to act in reliance hereon until the receipt by the Bank of written notice from the undersigned, or, in the event of the death of any of the undersigned, from the legal representative or representatives of such decedent or decedents, not to give further accommodation in reliance hereon.

(B) The undersigned agree(s) that whenever at any time or from time to time it shall make any payment to the Bank hereunder on account of the liability of the undersigned hereunder, the undersigned will notify the Bank in writing that such payment is made under this guaranty for such purpose. No payment by the undersigned pursuant to any provision hereof shall entitle the undersigned, by subrogation to the rights of the Bank or otherwise, to any payment by the Borrower or out of the property of the Borrower, except after payment in full of all sums (including said costs, expenses and interest) which may be or become payable by the Borrower to the Bank at any time or from time to time.

4. Upon the happening of any of the following events: the death or insolvency of the Borrower or the undersigned, or failure of the undersigned to deposit such collateral as may be demanded by the Bank, or suspension of business of the Borrower or the undersigned, or the issuance of any warrant of attachment against any of the property of the Borrower or the undersigned, or the making by the Borrower or the undersigned of an assignment for the benefit of creditors, or a trustee or receiver being appointed for the Borrower or the undersigned or for any property of either of them, or any proceeding being commenced by or against the Borrower or the undersigned under any bankruptcy, reorganization, arrangement of debt, insolvency, readjustment of debt, receivership, liquidation or dissolution law or statute, — then and in such event, and at any time thereafter, the Bank may, without notice to the Borrower or the undersigned, make the liabilities of the Borrower to the Bank, whether or not then due, immediately due and payable hereunder as to the undersigned, and the Bank shall be entitled to enforce the obligations of the undersigned hereunder.

5. The Bank may assign this instrument or any of its rights and powers hereunder, with all or any of the obligations hereby guaranteed, and may assign and/or deliver to any such assignee any of the security herefor and, in the event of such assignment, the assignee hereof or of such rights and powers and of such security, if any of such security be so assigned and/or delivered, shall have the same rights and remedies as if originally named herein in place of the Bank, and the Bank shall be thereafter fully discharged from all responsibility with respect to any such security so assigned and/or delivered.

## EXHIBIT 3, ANNEXED TO ANSWER

6. Notice of acceptance of this guaranty and of the incurring of any and all of the obligations of the Borrower hereinbefore mentioned is hereby waived. All of the provisions hereof regarding the security of the undersigned shall apply to the security of any or all of them, if there be more than one of the undersigned. This guaranty and all rights, obligations and liabilities arising hereunder shall be construed according to the laws of the State of New York.

IN WITNESS WHEREOF, this instrument has been duly executed and sealed by the undersigned the day and year first above written.

L. Stalnaker M.D. (L.S.)  
\_\_\_\_\_  
(L.S.)

STATE OF }  
COUNTY OF } ss.

On this 27th day of December, 1973 before me came \_\_\_\_\_

B. L. Stalnaker, M.D. to me known to be the individual(s) described in and who executed the foregoing instrument, and he duly acknowledged to me that he executed the same.

KATHRYN L. DADDARIO  
Notary Public, State of New York  
No. 60-0321033  
Qualified in Westchester County  
Commission Expires March 30, 1974

Kathryn L. Daddario  
Notary Public  
(Mrs. Rignard)

STATE OF NEW YORK }  
COUNTY OF } ss.

On the \_\_\_\_\_ day of \_\_\_\_\_, before me personally came \_\_\_\_\_ to me known, who, being by me duly sworn, did depose and say that he resides at No. \_\_\_\_\_ that

he is the \_\_\_\_\_ of \_\_\_\_\_, the corporation described in and which executed the foregoing instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of the board of directors of said corporation, and that he signed his name thereto by like order.

\_\_\_\_\_  
Notary Public

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EXHIBIT 4, ANNEXED TO ANSWER.

April 19, 1974

G & S Development Corp.  
c/o Richard H. Crowe, Jr.  
235 Broadway  
New York, N.Y. 10007

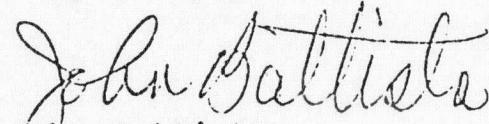
Gentlemen:

Inasmuch as your company has not yet secured permanent financing for the Cordova Doctors Hospital, NBW hereby demands full payment of the \$300,000 note past due since March 1, 1974. We further demand that full payment be made in federal funds no later than the close of business on Friday, April 25, 1974. A \$50,000 reduction was made on March 12, 1974, therefore \$256,911.46 will be due on the 25th including accrued interest and late charges totalling \$6,911.46.

By a copy of this letter, Doctors Stalnaker and Greskovich are being made aware of this demand and are hereby put on notice that as guarantors of the loan they are personally liable for any deficiency which may result.

If there are any questions regarding the above, please contact the undersigned.

Very truly yours,

  
John Battista  
Vice President

JB/kp

cc: Dr. B. L. Stalnaker  
Dr. Frank Greskovich  
Mr. Royal Pollitt

Certified Mail  
Return Receipt Requested

DEFENDANTS' TRIAL MEMORANDUM.

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

-----x

G & S DEVELOPMENT CORP., FRANK J.  
GRESKOVICH and BENJAMIN L. STALNAKER,  
Plaintiffs,

Index No.  
74 Civ. 2451  
(IBC)

-against-

LINCOLN FIRST REAL ESTATE CREDIT  
CORP. and NATIONAL BANK OF WESTCHESTER,

Defendants.

-----x

DEFENDANTS' TRIAL MEMORANDUM

The allegations in the complaint are that G & S commenced negotiations with LFRECC to obtain a construction loan secured by a building loan mortgage to be used by G & S to finance the cost of the construction of a hospital in Pensacola, Florida. It is alleged that as a result of these negotiations, LFRECC issued a conditional commitment, dated December 26, 1973, providing for a \$6,000,000 construction loan upon compliance with the conditions of the commitment. The construction loan commitment, like a prior December 3, 1973 letter of

## DEFENDANTS' TRIAL MEMORANDUM

LFRECC to G & S which provided that LFRECC would arrange to issue a commitment, expressly provided, among other items, that the loan was subject to approval by LFRECC's Executive Loan Screening Committee. G & S further alleges that LFRECC issued a stand-by commitment, dated December 26, 1973, to repay the construction loan when it had been fully advanced. This commitment was also in the amount of \$6,000,000. The stand-by commitment likewise contained a number of conditions, one of which was the closing of the construction loan in accordance with the terms of the construction commitment.

Both commitments were accepted by G & S in LFRECC's office on December 27, 1973, at which time G & S paid LFRECC a commitment fee of \$160,000. This amount was in addition to a \$20,000 fee paid for arranging the issuance of the commitments.

Plaintiffs allege that, when the commitments were delivered to G & S but prior to their acceptance, G & S requested a clarification of the condition of the

## DEFENDANTS' TRIAL MEMORANDUM

commitment which required approval of the construction loan by LFRECC's Executive Loan Screening Committee. This request, it is alleged, was directed to an officer of LFRECC, Royal W. Pollitt (hereinafter "Pollitt"). It is alleged, in the alternative, that Pollitt advised the plaintiffs, that this condition had been satisfied or had been waived.

Plaintiffs contend that they would not have accepted the commitments and paid the non-refundable commitment fee as consideration for their issuance unless they were satisfied that the condition requiring Executive Loan Screening Committee approval had been either waived or modified. The plaintiffs offer no written agreement from LFRECC which waived or modified this condition, but rely on the alleged oral representations.

Both commitments were issued simultaneously. They were delivered and accepted at LFRECC's office in the presence of Bergen,<sup>Muhlfeld</sup> and Pollitt. The stand-by commitment, accepted

## DEFENDANTS' TRIAL MEMORANDUM

at the same time as the construction loan commitment, contains a modification of its terms which was initiated by Richard H. Crowe, Jr. (hereinafter "Crowe") and Pollitt. The construction loan contains no such modification or deletion. The construction loan commitment was accepted unmodified and in its pristine form. It was accepted with the condition requiring approval of the loan by the Executive Loan Screening Committee. G & S saw fit to modify the required number of parking spaces, but not to do anything with regard to the more material condition.

Plaintiffs allege that, upon notice that the condition was either waived or satisfied, they requested a first advance on the construction loan in the amount of \$300,000 and that, upon such request, its officers were instructed to go to the office of the defendant NBW to obtain the advance. G & S executed a short-term, unsecured promissory note in the amount of \$300,000 payable to NBW. Payment on such note was personally guaranteed by Stalnaker and Greskovich, the latter through his attorney-in-fact, Crowe. On January 3, 1974, G & S received the

## DEFENDANTS' TRIAL MEMORANDUM

\$300,000. Plaintiffs urge that this short term, unsecured, promissory note, was the first advance under the proposed construction loan.

Plaintiffs then contend that on or about January 15, 1974, the day the loan was submitted to the Executive Loan Screening Committee for approval, and continuing through April, 1974, Pollitt on behalf of LFRECC, indicated its unwillingness to make the loan unless they were provided with a permanent take-out from an independent, financially responsible lending institution acceptable to LFRECC. Curiously enough, although the plaintiffs contend that they were informed on December 27, 1973 that this condition of the commitment was either satisfied or waived, the plaintiffs did not raise this point in any correspondence with LFRECC. Not until the commencement of this action was this point raised by the plaintiffs. On or about January 15, 1974, Pollitt, on behalf of LFRECC, allegedly repudiated the construction loan commitment.

## DEFENDANTS' TRIAL MEMORANDUM

Plaintiffs allege that, as a result of the non-consummation of the construction loan and plaintiffs' inability to procure a replacement loan, plaintiff G & S has been damaged. Its demand is that defendant LFRECC be specifically required to make the construction loan on the terms set forth in the construction loan commitment.

Plaintiffs further allege that, as a result of the urging of Pollitt, Crowe, on behalf of G & S, obtained a stand-by commitment from First Federal Savings & Loan Association of Erie (hereinafter referred to as "Erie"). Plaintiffs claim that \$6,000 was paid to Erie in order to obtain this commitment and that plaintiffs incurred expenses of \$2,000 in addition to the aforesaid sum, so that plaintiffs demand judgment against defendant LFRECC in the amount of \$8,000. As another claim for relief, it is alleged that plaintiff G & S has incurred additional expenses in the amount of \$5,000 subsequent to April 23, 1974 in attempting to secure substitute financing.

Plaintiffs allege that, as a result of the failure to close the construction loan, the developmental cost of the hospital in Pensacola has increased by an "in-determinate figure" which, they contend, exceeds \$1,800,000. Plaintiffs make the additional claim against LFRECC that, as a result of the failure to close the construction loan and the repudiation of the stand-by commitment, they have or will have lost their investment in the project, which amount equals \$540,000. Plaintiffs also demand that the "non-refundable commitment fee" in the amount of \$180,000 be returned to G & S.

With respect to their claims against defendant NBW, plaintiffs allege that Pollitt is an officer of both defendants and that both defendants are under common control. Plaintiffs further contend that, as a result of defendants' courses of action and representations that the loan transaction described in the construction loan commitment had, "but for the execution of customary documentation" been concluded, G & S thereupon executed

## DEFENDANTS' TRIAL MEMORANDUM

the \$300,000 note and the individual plaintiffs executed their personal guarantees of this note. It is plaintiffs' contention that this note and the money advanced thereunder represented the first advance under the construction loan. By reason of the foregoing, plaintiffs seek judgment against NBW enjoining it from taking any action with respect to the note or the guarantees, and they ask damages against NBW, jointly and severally with LFRECC, in an amount "in excess of \$2,353,000". Lastly, plaintiffs seek judgment against NBW cancelling the note and also setting-off the unpaid balance of the note against the amounts claimed by plaintiffs in the complaint.

The answer of the defendant LFRECC as to those matters alleged against it, admits that Pollitt and J. Bryan Bergen were officers of LFRECC at the times alleged and that negotiations between the agents of G & S and LFRECC took place in 1973. The answer further admits that the letter of December 3, 1973 and the three letters of December 26, 1973, accepted December 27, 1973, which are exhibits A, B, C & D to the complaint herein, were

## DEFENDANTS' TRIAL MEMORANDUM

transmitted and executed by Pollitt and Bergen.

The answer does not characterize any of the letters and leaves to the Court the terms of the said letters and the exact meaning and legal effect thereof, except that LFRECC admits that Exhibit B to the complaint contains, inter alia, a condition to the commitment: "3. Executive Loan Screening Committee Approval". Defendant LFRECC admits receipt of the \$180,000 non-refundable commitment fee paid as consideration for the commitments. It also admits that NBW made and advanced a \$300,000 short-term, unsecured loan to G & S evidenced by the promissory note of G & S, which note was guaranteed by Greskovich and Stalnaker.

Apart from the facts that Crowe and Pollitt had discussions in 1974 and that LFRECC did not make the construction loan for which plaintiffs had applied, defendant LFRECC denies all of the remaining allegations of plaintiffs.

The answer of NBW admits that each defendant is a separate corporation governed by its own board of directors and that each defendant is a wholly owned

## DEFENDANTS' TRIAL MEMORANDUM

10

subsidiary of Lincoln First Bank, Inc. The answer further admits any allegation which defendant LFRECC admits. In all other respects, NBW denies the allegations of the plaintiffs.

The defendants, as a first separate affirmative defense, plead that the complaint fails to state a claim upon which relief can be granted.

As a second separate affirmative defense, defendant LFRECC alleges that the acceptance of plaintiffs' application for a construction loan was conditioned upon the happening of a variety of events, subsequent to the qualified acceptance of the application, which conditions precedent are contained in Exhibits A, B, C and D of the complaint. LFRECC contends that these conditions have not been fulfilled and that, therefore, the commitments never ripened into a binding obligation which would require it to fund the loan.

Defendant LFRECC alleges that it notified plaintiffs on and after January 15, 1974 that its Loan

Screening Committee had not approved the loan on the terms as applied for, and would approve the loan only upon the condition that the loan be subject to a firm, separate take-out agreement to be made to plaintiffs by a financially responsible lending institution approved by and satisfactory to LFRECC. It is LFRECC's position that the take-out was never provided, and the condition requiring approval of the loan by the Loan Screening Committee and the other conditions were never fulfilled.

In addition, as a third separate affirmative defense, LFRECC pleads that another condition of the construction loan commitment, the closing of the loan by April 1, 1974, was not fulfilled and that, therefore, the qualified acceptance became a nullity.

A fourth separate and affirmative defense is that the qualified acceptance of the permanent loan contained a number of conditions precedent, which conditions are enumerated in Exhibit C to the complaint. Among

these conditions precedent were that the permanent loan had to close on or before the expiration of the construction loan and, further, that if the construction loan was not closed according to its terms, the permanent loan automatically terminated and ceased to have any force and effect. LFRECC contends that, since the permanent loan commitment was conditioned upon the occurrence of events specified in the construction loan commitment, which conditions were never fulfilled, the permanent loan commitment became a nullity.

As a fifth separate and affirmative defense, LFRECC alleges that, pursuant to Exhibits A, B, C and D of the complaint, the plaintiffs became obligated to pay LFRECC a \$180,000 non-refundable fee, which sum represented the reasonable pre-estimation of the damages to LFRECC if the loan failed to close for any reason. This, of course, is less than plaintiffs' "indeterminate" figure requested as damages.

Defendant LFRECC counterclaimed against G & S on the short-term promissory note executed on December

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31, 1973 by G & S, made payable to NBW, in the original principal sum of \$300,000. After maturity of the note, and on or about April 19, 1974, NBW made demand on G & S in the amount of \$256,911.46, which sum represented the unpaid principal, accrued interest and late charges. No further payment was made by G & S and, subsequently, LFRECC purchased this note from NBW for a price of \$262,258.69 on June 20, 1974. LFRECC demands judgment against G & S in the amount of \$262,258.69 with interest from June 20, 1974.

LFRECC also counterclaimed against the individual guarantors of the aforesaid note, Greskovich and Stalnaker, who had given their individual guarantees to NBW in connection with the note. NBW, at the time it demanded payment of G & S on the note, also gave notice to Greskovich and Stalnaker of the non-payment of the note and the demand for payment. No payment was received from either of the guarantors. LFRECC therefore demands judgment declaring the guarantors jointly and severally liable

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to LFRECC in the amount of \$262,258.69 with interest from June 20, 1974.

Plaintiff G & S, in its reply to the counter-claim of LFRECC admits the execution of the note by G & S for \$300,000, receipt of the money and receiving notice of demand for payment. G & S denies the remaining allegations of LFRECC's counterclaim.

As to the counterclaim on the guaranties, the individual plaintiffs, Greskovich and Stalnaker, admit in their reply the execution of the guaranties by them and admit receipt of the written notice for payment. The plaintiffs deny the remaining allegations of the counter-claim.

Plaintiffs raised the following defenses to the counterclaims: (1) that the counterclaim does not state a claim upon which relief may be granted; (2) estoppel; (3) waiver; and (4) laches.

The defendants LFRECC and NBW demand judgment dismissing the complaint and for judgment on LFRECC's

counterclaims against plaintiffs in the amount of \$262,258.69 with interest from June 20, 1974, together with the costs and disbursements of this action and for such other and further relief as may be just and proper.

Defendants maintain that it is obvious that the validity of the construction loan commitment was clearly and specifically conditioned upon several conditions precedent. These conditions precedent included, among others, (1) approval of the loan by LFRECC's Executive Loan Screening Committee; (2) closing of the loan by April 1, 1974. LFRECC will demonstrate that the conditions precedent were not fulfilled and that therefore the construction loan commitment became, by its own terms, null and void. The complaint admits and LFRECC will show that plaintiffs were notified on or about January 15, 1974, only 19 days after the issuance and acceptance of the qualified conditional construction loan commitment, that its Loan Screening Committee had not approved the loan.

With respect to the stand-by mortgage commitment, defendants maintain that it, too, was only a conditional commitment and subject to several conditions precedent. The stand-by mortgage commitment was, amongst others, conditioned upon the validity of the construction loan commitment and the closing of a construction loan pursuant to the terms of the construction loan commitment by April 1, 1974. Since the conditions precedent to the construction loan commitment were not fulfilled, that commitment was null and void. Once the construction loan commitment ceased to have any force or validity, the stand-by mortgage loan commitment was ipso facto a nullity.

The terms of the transmittal letter of December 26, 1973 provided that "It is expressly agreed and understood that this \$180,000.00 fee is hereby earned and should for any reason this loan fail to close, will be retained by Lincoln First Real Estate Credit Corporation as liquidated damages". It is evident that the plaintiffs agreed to this understanding by (1) paying the \$180,000 and (2) by accepting the commitment letters.

With respect to the counterclaims, LFRECC contends that it is beyond quibble that the \$300,000 short-term, unsecured loan, guaranteed by the individual plaintiffs, made by NBW to G & S, had no connection with the construction loan commitment. LFRECC will show that this note was, purely and simply, a commercial note. It bears no resemblance to a first take-down under a construction loan commitment. Further, LFRECC is prepared to prove that the guaranties of this note by Greskovich and Stalnaker were guaranties of the commercial loan and not the guaranties required as one of the conditions of the construction loan commitment.

Defendants maintain that the contentions of the plaintiffs, as to misrepresentation, estoppel, waiver and laches have no basis in fact and are without merit.

Defendants' answer is based upon the parol evidence rule, the common law of contracts and negotiable instruments, embodied in the statutory and case law of the State of New York, the jurisdiction whose law is applicable to this action. The thrust of the defendants'

position is that the construction loan commitment of December 26, 1973 and the stand-by commitment of the same date never ripened into contracts because they were clearly, by their express terms, subject to several material conditions precedent and these conditions precedent were never fulfilled.

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## POINT I

THE LETTER AGREEMENTS OF DECEMBER 26, 1973 WERE EXPRESSLY MADE SUBJECT TO A NUMBER OF CONDITIONS PRECEDENT WHICH WERE NOT FULFILLED, AND LFRECC WAS UNDER NO DUTY TO MAKE THE PROPOSED LOANS TO PLAINTIFFS

The letters of December 26, 1973 from LFRECC to G & S (PX 11 and 12<sup>1</sup>) contain the entire agreement of the parties with respect to the construction and permanent financing to be secured by a mortgage on real estate.

PX 11, the construction loan letter, provides as follows:

"This loan has been approved, subject to the following conditions:

1. Title insurance survey and all other legal documents used in connection with this loan are to be approved by counsel for Lincoln First Real Estate Credit Corporation.
2. A confirmatory M.A.I. appraisal satisfactory to Lincoln First Real Estate Credit Corporation.
3. Executive Loan Screening Committee approval.
4. Audited financial statements of the borrowing corporation and the principals thereof.

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<sup>1</sup> PX herein refers to plaintiffs' exhibits marked in the pre-trial order.

5. Compliance with all regulations, ordinances, etc. promulgated by any governmental agency, department or subdivision, and any and all amendments thereto.
6. Fire insurance with extended coverage and other hazard insurance in the amount and by companies acceptable to us.
7. Agreement by the participating banks to participate in this loan and execution of a participation and servicing agreement.
8. With the exception of attorneys' fees, all other fees and expenses incidental to this transaction shall be borne by you; you shall pay all closing costs including but not limited to mortgage tax, mortgagee's title insurance premium, recording fees and appraisal fees.
9. Compliance with all terms and conditions of the permanent loan commitment issued by Lincoln First Real Estate Credit Corporation of even date herewith.
10. Approval of the proposed administrator.
11. This commitment shall be null and void if the loan transaction is not closed on or before April 1, 1974.
12. A performance and completion bond issued by a company acceptable to us in an amount of not less than \$5,000,000.
13. Final plans and specifications must be approved by our designated architects. Inspection fees of our architects are to be paid by you. (emphasis supplied)

The obligation on the part of LFRECC, clearly expressed in PX 11, was not to arise unless and until each and every of these 13 conditions was complied with.

These terms were, as a matter of law, conditions precedent, i.e., requirements which must be fulfilled before a duty of immediate performance arises on the promise which the condition qualifies. Axelrath v. Spencer Kellogg & Sons, Inc. (1943) 33 N.Y.S. 2d 94 (N.O.R.), aff'd, 265 A.D. 874, aff'd, 290 N.Y. 767 (1943). Legal obligations arise only after satisfaction of the condition. Wood & Selick v. Ball, 190 N.Y. 217 (1907); Boro Motors Corp. v. Century Motor Sales Corp., 18 Misc. 2d 1009, (Sup. Ct. Kings 1959); Hershey v. Carter, 137 N.Y.S. 2d 207 (N.O.R.) (Sup. Ct. New York 1954).

The defendant LFRECC unquestionably had the right to qualify and condition its performance on any conditions precedent it wanted. There is no allegation of fraud, bad faith or coercion. The president of G & S was a New York lawyer. There was a market for the amount of money G & S wished to borrow; numerous lenders were in competition with one another for loans of this size. This

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competition placed the parties at equal bargaining strength. LFRECC had the absolute right to make the transaction subject to any state of facts, events or occurrences it might name and, when these were accepted, the only obligation on its part was not to interfere with the performance of the conditions. There is no allegation that it interfered with them. It never guaranteed that the conditions would be satisfied. Any money expended by G & S on the strength of the clearly qualified, conditional commitment was done so at its own peril. It assumed the risk that all the conditions precedent would be satisfied. Wilhelm v. Wood, 151 App. Div. 42, (2nd Dept. 1912).

The plaintiffs acknowledge that the conditions precedent were never in fact fulfilled. Their contention ("h" at page 6 of the pre-trial order) is that the Cordova Hospital project was "formally submitted to the Loan Screening Committee on January 15, 1974". The Loan Screening Committee expressly conditioned its approval of the project on the plaintiffs obtaining a firm, permanent take-out from an independent, financially responsible

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institution acceptable to LFRECC. Since this, like other conditions precedent, was never complied with, LFRECC's duty to fund the construction loan never came into existence.

Likewise, the second letter agreement, PX 12 dated December 26, 1973, for the stand-by, permanent financing was also an agreement subject to conditions precedent. It provides as follows:

"The loan commitment as contained herein  
is subject to the following express terms  
and conditions:

1. Approval of title and all documents and papers by our attorneys, McCarthy, Fingar, Gaynor & Donovan, 175 Main Street, White Plains, New York.
2. Receipt at the closing of a policy of title insurance in loan amount on the American Title Association Revised Coverage form issued by a title company approved by us, containing no exceptions other than those approved by us.
3. We are to receive and approve a currently dated survey of the parcel or parcels to be mortgaged, certified to by a registered land surveyor, showing the dimensions and total square foot area of the plot, the dimensions and location of all improvements and easements, the locations of adjoining streets and the distance to and name of the nearest intersecting streets.
4. All outstanding taxes and assessments affecting any of the security for this loan due and/cr payable on the date of

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the closing shall be paid.

5. The loan will be evidenced by your notes in the amount of \$6,000,000 which shall be modified and extended to incorporate the terms of this agreement, secured by a first mortgage lien which shall encumber the real estate, buildings and improvements located thereon, and all fixtures and articles of personal property affixed by you or to be used by you in connection with the operation of said premises, buildings and improvements. All of the guarantees, collateral and restrictive provisions in effect during the construction loan period shall continue effective during the term of the permanent loan.
6. We are to be furnished with original paid up fire insurance policies of companies acceptable to us containing the non-contributory New York Standard Mortgagee Clause in our favor. Said policies are to be for three years or more and be in amounts based on an insurable value of \$9,500,000.
7. The mortgage papers will provide for payment of late charges in the amount of four (4¢) cents per dollar on all payments made fifteen (15) days or more after their due date.
8. The mortgage shall contain a provision permitting the mortgagor to prepay the loan in whole or in part at any time without payment of a prepayment fee or charge of any kind after ninety (90) days prior written notice.
9. This commitment shall be null and void if the loan transaction is not closed on or before the expiration of our construction loan, as the same may be extended. In the event our construction loan mortgage is paid in full, this commitment shall auto-

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matically terminate and have no further force and effect.

10. Funds are to be advanced upon the satisfactory completion of the building in accordance with the plans and specifications submitted to Lincoln First Real Estate Credit Corporation, and receipt by us of the certificate of occupancy and fire underwriters certificate.

11. Any and all licenses, permits and consents of any governmental authority which are necessary to open the new addition for use as a hospital facility shall be received and copies thereof delivered to us prior to closing. (emphasis supplied)

In addition to such conditions precedent, the letter further provided that:

"If the construction loan committed for simultaneously herewith is not closed pursuant to its terms, this commitment shall automatically terminate and have no further force and effect."

Thus the stand-by permanent commitment was expressly conditioned upon the plaintiffs closing of the construction loan according to the terms of the construction loan commitment. Since the construction loan was never closed by plaintiff, the defendant's obligation to perform under the stand-by commitment never arose.

Through no fault of the defendants, the conditions precedent to each of the commitments were not fulfilled and

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therefore they never ripened into binding contracts under which the defendant LFRECC was obligated to perform. The Court will therefore be required to direct a verdict for the defendant.

## DEFENDANTS' TRIAL MEMORANDUM

## POINT II

PAROL EVIDENCE IS INADMISSIBLE TO CONTRA-DICT THE AGREEMENTS OF DECEMBER 26, 1973

As shown in Point I, the agreements of December 26, 1973 were subject to conditions precedent, which conditions were never fulfilled. The plaintiffs argue that, contemporaneously with the execution of these agreements, Pollitt stated that the condition of the loan requiring Executive Loan Screening approval, had been either satisfied or waived. (Plaintiffs' pre-trial memo p. 6).

Both commitments were issued, delivered and accepted at the same time, December 27, 1973. They were delivered and accepted at LFRECC's main offices. Present were Crowe, Bergen, Muhlfeld, Stalnaker and Pollitt. The parties mutually agreed to modify the stand-by permanent loan commitment by reducing the number of parking spaces required. The parties physically deleted the original number, replaced it with a second and initialed the change.

Although the condition requiring approval of the loan by the Executive Loan Screening Committee was by far a more material and crucial condition to both sides and, although plaintiffs allege that they were informed at that

time that the condition had been waived or satisfied, and although Crowe, the president of G & S was present and was an attorney, no one deleted, modified or changed this condition; it was accepted, as issued, with that condition.

The language of these agreements leaves no doubt that the writings are complete, unambiguous and unequivocal. No recourse need be had to anything else in order to determine the meaning and intent of the parties. These writings obviously mean exactly what they purport to say, i.e. that LFRECC would make the loan only after all of the stated, express conditions were complied with. There is no ambiguity latent or patent within the writings. They are the complete, total agreement and understanding of the parties.

It is the long-settled law in the State of New York that, when the parties to an agreement have memorialized their understandings in a writing, the parol evidence rule forbids the introduction of evidence of any prior oral or written agreement or of any contemporaneous oral agreement which is offered to contradict, vary, add to, or subtract from the terms of the writing. Thomas v. Scutt, 127 N.Y. 133, 27 (1891).

The plaintiffs try to avoid this ancient rule by

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arguing that the condition requiring Executive Loan Screening Committee approval was, in effect, no longer a condition to the contract once the officer of LFRECC allegedly notified them that this condition was either satisfied or waived. This proposition is totally without merit.

For this legal argument, we pass over the fact that LFRECC vigorously disputes the fact that any such statement was made by its officers. Even if it were made, any testimony offered to show that such a statement was made is barred as a matter of law. The parol evidence in New York is more than a rule of evidence; it is a rule of substantive contract law which defines the limits of the contract.

Fogelson v. Rackfay Const. Co., 300 N.Y. 334, 90 (1950);

Higgs v. LeMaziloff, 263 N.Y. 473 (1934).

Any such alleged oral statement, to the effect that the condition precedent of Screening Committee approval had been satisfied or waived, made contemporaneously with the issuance and acceptance of the December 26, 1973 letter agreements, both contradicts and negates the written condition of Screening Committee approval. It is logically inconsistent and semantically impossible for both the written condition requiring the Executive Loan Screening

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Committee approval and the alleged oral statement that it was either waived or satisfied, to exist at the same time. Thus the parol evidence/<sup>rule</sup> is a bar to any testimony of this alleged oral representation. Fadex v. Crown, 272 App. Div. 272 (1st Dept. 1947), reversing 189 Misc. 611 (1947), aff'd 297 N.Y. 903 (1948). In Fadex the plaintiff contended that the alleged oral statement of a condition created no triable issue of fact because it was inconsistent with the written instrument and hence not provable under the parol evidence rule. The question certified was answered in the affirmative, thus upholding the plaintiffs' contention as a matter of law.

The letter agreements expressed the intention of the parties on this matter. The alleged oral statement would necessarily negate the written condition. Therefore, any testimony regarding it is inadmissible and immaterial as a matter of law. Meadow Brook National Bank v. Bzura, 20 AD 2d 287 (1st Dept. 1964).

Leumi Financial Corp. v. Richter, 17 N.Y. 2d 166 (1966), is the controlling case on this point and conclusive against the plaintiffs. In Leumi, the Court of Appeals unanimously held, at page 173:

"The primary question is not whether Spinrad made the statements ascribed to him by defendant Richter (or whether he was authorized to make them). The rule of law which defeats defendants and makes this summary judgment valid is that which makes parol evidence inadmissible to vary the terms of a written instrument. Acceptance of defendants' version of the transaction could be accomplished only by letting Richter give oral evidence directly contradicting the clear terms of a written agreement."

It is submitted that what the plaintiffs will attempt to prove by parol testimony is precisely the reason for which the rule was devised. The writings of December 26, 1973 are complete, clear and unambiguous. The testimony to be offered by plaintiffs that the condition was waived or satisfied would have the effect of making the written condition a nullity in the respect stated. The proffered testimony, if allowed, would contradict and negate the writing and, as a matter of law, is prohibited. It is therefore inadmissible and legally immaterial as a matter of law.

## POINT III

THE STATUTE OF FRAUDS PROHIBITS AN  
ORAL MODIFICATION OF THE LETTER  
AGREEMENTS OF DECEMBER 26, 1973

The General Obligations Law §5-703 of New York provides, inter alia, that:

"An estate or interest in real property, other than a lease for a term not exceeding one year, or any trust or power, over or concerning real property, or in any manner relating thereto, cannot be created, granted, assigned, surrendered or declared, unless by act or operation of law, or by a deed or conveyance, in writing, subscribed by the person creating, granting, assigning, surrendering or declaring the same, or by his lawful agent, thereunto authorized by writing."

An agreement to give a mortgage on real estate is an agreement which falls within the ambit of the Statute of Frauds. Judge Cardozo, writing for a unanimous court, in the leading case on this question in New York, Sleeth v. Sampson, 237 N.Y. 69 (1923), p. 72, stated:

"A mortgage is a conveyance of an interest in real property within the meaning of section 242 (Bogert v. Bliss,

148 N.Y. 194, 199). A contract to give a mortgage is a contract for the sale of an interest in real property within the meaning of section 259. No doubt the word 'sale', when applied to such a transaction is inexact and inappropriate. Our present statute comes to us by descent from the English statute (29 Car. II, C 3, §4), which speaks of any contract or sale of land, tenements or hereditaments or any interest in or concerning them. The change of phraseology has not worked a change in meaning. One who promises to make another the owner of a tenement or charge upon land promises to make him the owner of an interest in land, and this is equivalent in effect to a promise to sell him such an interest. This meaning is fixed by an unbroken series of decisions."

In accord Williston On Contracts, Third Edition, Vol. 3, Section 491; Bruce Realty Co. of Fla., v. Berger, 327 F. Supp. 507 (D.C.N.Y. 1971); Sholom & Zuckerbrot Queens Leasing Corp. v. Forate Realty Corp., 29 A.D. 2d 571 (2nd Dep't 1967).

Consideration of the letter agreements of December 26, 1973, demonstrates that these writings evidenced the clear intent of the parties that LFRECC would make a \$6,000,000 construction loan to G & S which in turn agreed

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to give a mortgage lien on its real estate as security for the obligation to repay the loan. The letters were the complete understanding of the parties. All the material elements of the mortgage, such as the amount of the loan, the term, the interest rate and the property to be mortgaged, were included in these agreements. Bowery Savings Bank v. Retail Realty, Inc., 10 A.D. 2d 924 (1st Dep't 1960).

Therefore the agreements of December 26, 1973 satisfy the statute and any modification thereof must be in writing.

It is equally well settled that where an agreement is within the purview of the Statute of Frauds and therefore must be in writing, the Statute of Frauds similarly renders invalid and ineffectual an oral agreement changing or modifying the terms of the written agreement.

Van Iderstine Co. Inc. v. Barnet L. Co., Inc., 242 N.Y. 425 (1926); Zelazny v. Pilgrim Funding Corp., 41 Misc. 2d 176 (Dist. Ct. Nassau 1963); General Obligations Law §5-1103.

Therefore, the plaintiffs' attempt to show that an officer of LFRECC allegedly told them at the time of

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the execution of the agreements of December 26, 1973, that the condition requiring Executive Loan Screening Committee approval had been waived, is both inadmissible and ineffective to modify the terms of the written agreements on a subject which is within the Statute of Frauds. Plaintiffs cannot prove an oral modification of a contract required to be in writing. Sleeth v. Sampson, supra.

## POINT IV

IF THE DEFENDANT LFRECC HAS BREACHED  
THE AGREEMENTS OF DECEMBER 26, 1973,  
THEN THE PLAINTIFF IS ENTITLED TO  
ONLY NOMINAL DAMAGES

Assuming, only for the purpose of argument, that the defendant LFRECC has breached the letter agreements of December 26, 1973, the plaintiff would be entitled only to nominal damages.

The general rule of damages in an action for a breach of a contract is that the defendant's liability is limited to those consequences which were reasonably foreseeable as probable if the contract were broken, at the

## DEFENDANTS' TRIAL MEMORANDUM

time when it was entered into. Globe Refining Co. v. Landa Cotton Oil Co., 190 US 540, 47 L ed. 117, 23 S. Ct. 754 (1903); Czarnikow-Rionda Co. v. Federal Sugar Refining Co., 255 N.Y. 33 (1930). The key element of contract damages is what the defendant was reasonably expected to foresee as the natural and probable consequences of a breach on its part, at the time the contract was entered into. Czarnikow-Rionda Co. v. Federal S.R. Co., *ibid*; Hadley v. Baxendale, 9 Exch. 341 (1854).

The essence of the transaction confronting this Court, is that G & S applied to LFRECC, as well as to other lenders, for a loan of money to finance the construction of a hospital. LFRECC's business, like that of other lenders, is to make money available to qualified borrowers at an interest rate which will give a profitable return on its money. Money is a "commodity" which is sold and its selling price is the interest rate which a borrower agrees to pay for the use of it. Boston Road Shop Ctr. v. Teachers Insurance and Ann. Ass'n., 13 A.D. 2d 106 (1st Dep't 1961) <sup>Affirmed 11 N.Y.2d 831 (1962)</sup>

LFRECC certainly had no monopoly on the money market. There were and are any number of banks, in-

surance companies and other institutions with money available to lend. At the time LFRECC issued the commitments, it was in effect agreeing to "sell" its commodity at a certain price, i.e., the interest rate, upon compliance with certain conditions. The logical and foreseeable result of a breach, would be that the purchaser-borrower would have to obtain the money elsewhere, possibly at a higher rate of interest. As Justice Pound stated in Eaton v. Reich, 258 N.Y. 202, p. 206 (1932):

"The money may have been obtained from other sources. In that event, no legal damage was involved. One man's money was as good as another's."

Thus, under general contract damage theory, the plaintiff would be entitled solely to the difference in interest rates or the "price" it had to pay for the money. That the plaintiff was unable to acquire the money from another lender was not due to anything attributable to the defendant. It was due solely to the plaintiff's lack of credit or lack of business acumen in the real estate area, or a myriad of other factors not traceable to the defendant. (Perhaps other potential lenders were hesitant

## DEFENDANTS' TRIAL MEMORANDUM

about making a \$6,000,000 loan to a corporation owned by an individual who wrote a letter to himself expressing his wholehearted support of the project, as one guarantor did.)

The leading New York case on damages for breach of a contract to lend money is Avalon Construction Corp. v. Kirch Holding Co., 256 N.Y. 137 (1931). In the Avalon case, Justice Kellogg of the Court of Appeals expressed the measure of damages as follows:

"When money is loaned, or goods sold on credit and debt is not paid when due, obviously the delay occasions the creditor nothing more than the temporary loss of the use of his money. For this loss, the law compensates the creditor with an award of no greater or other sum than legal interest. (Sedgwick on Damages, Vol. 2 §622-b; Williston on Contracts, Vol. 3, §410)

Logically, a prospective borrower whose contract for a loan has been breached, should stand in no better case. His money loss is likewise nothing else than the loss of its use for a limited period. However, the interest charge which would measure that loss merely cancels the interest charge which would measure the loss of the lender had the loan been made, so that

if a balance be struck, no loss is found. Consequently, reason compels and all authority supports the conclusion that a breach of a [a] contract to make a loan, standing by itself, involves no legal damage." ibid p. 141

The Restatement of the Law of Contract, Vol. 1, §343 puts the rule in the following manner:

"Damages for breach of a contract to lend money are measured by the cost of obtaining the use of money during the agreed period of credit, less interest, at the rate provided for in the contract, plus compensation for other unavoidable harm that the defendant had reason to foresee when the contract was made."

There is a statement in Avalon Construction Corp. v. Kirch Holding Co., supra, to the effect that, under "peculiar" circumstances, the plaintiff can recover special damages. This dictum is well within the general rule of damages for breach of a contract. Logically, the rules of damage which are generally applicable to recover special damages are applicable here. It is beyond question that, in order for a defendant to be liable for special damages, the defendant, at the time of the making of the contract,

## DEFENDANTS' TRIAL MEMORANDUM

had to have knowledge of special circumstances from which it might have reasonably been foreseen that a breach on its part would result in a greater loss to the plaintiff than would otherwise have been expected from the breach. The notice of the peculiar circumstance which may cause special damage must be known by the defendant at the time it enters into the contract.

Thus liability for any special loss, over and above nominal damages occasioned by the alleged breach of LFRECC in not advancing the money to the plaintiff, can only be attributed to LFRECC if it knew that there was no other money available in the financial market place which would be lent to the plaintiff. Since LFRECC by no means had all the available money in the country, there was no reason for LFRECC to know that no other lender would lend the plaintiffs the money. Similarly LFRECC had no knowledge, at the time of the making of the alleged contract, that this borrower would suffer any greater loss, other than possibly paying a higher interest rate for the loan of the money. The plaintiff has neither alleged nor proved that

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LFRECC had knowledge of any special circumstances on December 26, 1973 that would put LFRECC on notice that special damages would naturally flow from its refusal to lend the money. LFRECC had no special knowledge or notice because plaintiff did not give it any. More importantly, there were no special circumstances. Globe Refining Co. v. Landa Cotton Oil Co., 190 U.S. 540 (1903); Czarnikow-Rionda Co. v. Federal S.R. Co., 255 N.Y. 33 (1930); Chapman v. Fargo, 223 N.Y. 32 (1918).

The plaintiff seeks to recover from defendants the loss of its investment and the increased cost of construction. Not only are these special damages not recoverable because they were not in LFRECC's contemplation at the time it issued its conditional commitments, but they are not recoverable for the further reason that such "damages" are too hypothetical and speculative on the facts of this case. The plaintiffs' complaint itself speaks of "indeterminate" damages. The general rule for excluding profits and loss of investment from damages in a contract action are based on at least 3 grounds: (1) profits are too dependent upon numerous and changing contingencies to

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constitute a measure of damages; (2) a loss of profits is ordinarily remote and not the direct and immediate result of a non-fulfillment of the contract; and (3) the engagement to pay such loss of profit does not form a basis of the contract and was not within the contemplation of the parties at the time of the contract. Witherbee v. Meyer, 155 N.Y. 446 (1898).

This rule is even more strictly construed where it involves, as it does here, a new business enterprise. The facts of the present case bring it within the general rule that loss of profits cannot be recovered. The law in this area is best stated by the Court of Appeals in Cramer v. Grand Rapids Show Case Co., 223 N.Y. 63 (1918). In Cramer plaintiff sued the defendant for loss of anticipated profits, allegedly resulting from the defendant's failure to supply furniture and fixtures for plaintiff's new business, which failure delayed its opening. The Court of Appeals, per Judge Hogan, unanimously held that, where a new venture was to be started, loss of profits could not be recovered. The Court held:

"I have pointed out the limited business experience of plaintiffs, the

## DEFENDANTS' TRIAL MEMORANDUM

fact that the enterprise was an adventure in a locality where neither one of them had before been engaged in business. No doubt the plaintiffs entertained hope that the business venture upon which they were about to embark would prove successful. Such expectation was evidently based upon a consideration of the resident population of the city of Amsterdam, the business activity of the residents of that city and the number and character of competitors in the same general line of business. Plaintiffs, however, had no assurance that the venture would not prove to be a failure."

The fact that no other investor would lend G & S the money is some evidence that others felt there was doubt as to probability of the success of the venture. The plaintiffs seek to recover profits from the defendant which they may have been unable to earn if the hospital were erected. It would be a gross miscarriage of justice if these plaintiffs, with their total lack of business expertise, could obtain their "anticipated" profits and increase on their investment from the defendants. The plaintiffs, since the field of their own individual participation is medicine and dentistry and since the hospital has not been in operation, have no "track-record" against which a jury could measure their "damages".

## POINT V

SPECIFIC PERFORMANCE IS NOT AN AVAILABLE  
REMEDY IN AN ACTION FOR AN ALLEGED BREACH  
OF A CONTRACT TO LEND MONEY

The plaintiffs request, as an alternative to damages at law, that LFRECC be required to specifically perform the alleged contract and make the construction loan. There is no basis in law for plaintiffs' request.

It is unquestioned that specific performance is an equitable remedy which will not be granted where its imposition would be inequitable, oppressive or unconscionable.

Phalen v. United States Trust Co., 186 N.Y. 178 (1906). To grant the plaintiff specific performance of the alleged contract to lend the construction money, would be unduly harsh and oppressive on the defendant. If there was a breach, it occurred on January 15, 1974, when the Executive Loan Screening Committee met and failed to approve the loan. This meeting was held a mere 19 days after the issuance of the conditional commitments. To require the defendant to lend the plaintiff \$6,000,000, because of an alleged breach after this period of time, is to lose sight of reality and would be clearly inequitable to the defendant under the present facts.

## DEFENDANTS' TRIAL MEMORANDUM

Specific performance is not to be decreed unless it is certain that the contract is valid, binding, complete, definite and certain. Keystone Hardware Corp. v. Tague, 246 N.Y. 79 (1927); Ansorge v. Kane, 244 N.Y. 395 (1927). Under the present factual context, it is by no means clear that the contract ever came into existence and, if it did, it is by no means certain that the defendant breached it.

Specific performance of a contract to lend money has rarely, if ever, been granted in any jurisdiction. The rule that a court will not grant specific performance of a contract to lend money had its genesis in the English case of Rogers v. Challis, 27 Beau. 175, 54 Eng. Rep. 68 (Ch. 1859). The effect of the rule of Rogers v. Challis has been summarized as follows: "That specific performance of a contract to lend money cannot be enforced is so well established, and obviously so wholesome a rule, that it would be idle to say a word about it." South African Territories Ltd. v. Wallington, A.C. 309, 318 (1898) Draper, The Broken Commitment: A Modern View of the Mortgage Lender's Remedy, 59 Cornell L. Rev. 418 (1974).

The leading case on the availability of the remedy of specific performance of a contract to lend money is

## DEFENDANTS' TRIAL MEMORANDUM

The Bradford E & CRR v The New York LE & WRR, 123 N.Y. 316

(1890), which incorporated the rule of Rogers v. Challis into New York law. In Bradford, Judge Peckham stated the general rule as follows, pages 324-325:

"This is substantially a decree for the specific performance of a simple contract to advance money to the plaintiff company. Generally speaking, equity does not decree a specific performance of such a contract."

Again, on p. 327, Judge Peckham stated:

"Of course in the action at law there must be proof in the case showing in some form and to some extent the amount of the damages that the plaintiff has sustained by the defendant's breach of his agreement. And it is equally plain that it must be a rare case indeed where it can be said that a person has sustained any damages by the refusal of another to advance money, which he has agreed to advance, where the person to whom it is to be advanced is, by the agreement, under a valid obligation to pay it back immediately. Equity at all events, never enforces such an agreement, and in a court of law, there must be proof of damages."

In particular, the plaintiff seeks specific performance of a construction loan. A construction loan entails a great deal of day-to-day supervision. Plans must be approved, modifications must be reviewed, the loan is advanced in a series of stages and only when an inspecting architect has certified that certain materials are on the job site

and that construction has progressed to a specified stage of completion, and then only when title is clear at the time of each advance. It is settled that the remedy of specific performance is available only in the sound discretion of the Court and when the grant of such relief will not require constant judicial supervision. Gotthelf v. Stranahan, 138 N.Y. 345 (1893).

The test has been stated as whether the desired performance is the kind of act which a Court can simply direct, and as to which there can be little or no dispute as to whether or not there has been compliance. If, on the other hand, performance on the defendants' part would require a series of acts, each of which could very easily develop into disputes as to whether the defendant was in good faith compliance with the decree, and the decree would require constant, day-to-day, judicial supervision, specific performance will not be granted. Standard Fashion Co. v. Seigel-Cooper Co., 157 N.Y. 60 (1898); Restatement, Contracts §371, 55 N.Y. Jur. §39.

A construction loan differs in a qualitative sense from a permanent mortgage loan. In the latter, there is only one advance and the borrower thereafter makes his or its

## DEFENDANTS' TRIAL MEMORANDUM

payments. The construction loan situation would deeply immerse the Court in an involved series of transactions and would not be a proper subject for specific performance.

Lastly, specific performance is not awarded unless a plaintiff has demonstrated that it has or is prepared to perform all the material acts on its part to be performed.

Bowen v. Horgan, 259 N.Y. 267 (1932). Forgetting for the moment whether or not the loan had to be approved by the Executive Loan Screening Committee, numerous other conditions had to be fulfilled prior to making this loan: a survey would have to be prepared, submitted and reviewed; a title binder would have to be issued, reviewed and title cleared; a manager of the hospital would have to be appointed and approved; plans had to be approved; an agreement was required for other lenders to participate in the loan; a participation and servicing agreement had to be signed; a permanent take-out had to be secured; and approval obtained from all regulatory agencies -- federal, state and local -- having jurisdiction over a hospital facility. The plaintiff has not done anything with regard to these matters, and not shown that it will be able to do so. Under these facts, specific performance must be denied.

## POINT VI

DEFENDANT IS ENTITLED TO RETAIN THE  
\$180,000 PAID AS CONSILTRATION FOR THE  
COMMITMENT LETTERS

On December 3, 1973, the defendant LFRECC issued a letter to the plaintiff G & S whereby LFRECC agreed, upon payment of \$20,000, to make arrangements for the issuance of a construction loan commitment. The December 3rd letter expressly stated, among other things, that any commitment which would be issued would be conditioned upon approval of it by the Executive Loan Screening Committee. The plaintiff, knowing full well of this condition, paid LFRECC the requested \$20,000. Again, on December 27, 1973, LFRECC transmitted the conditional commitment letters to G & S. The transmittal letter stated as follows:

"Further, with respect to the enclosed letters of commitment, it is understood that in addition to all fees and expenses set forth in said commitment letters there is due upon your acceptance of these commitments a non-refundable fee in the sum of \$180,000 (\$20,000 of which we now hold). Upon acceptance of these commitments by the borrower, there shall be sent to us, together with your acceptance (signed copies of these commitments), the sum of \$160,000.00.

It is expressly agreed and understood that this \$180,000 fee is hereby earned and should for any reason this loan fail to close, will be retained by Lincoln First Real Estate

## DEFENDANTS' TRIAL MEMORANDUM

Credit Corporation as liquidated damages."

This \$180,000 fee had a two-fold purpose. In the first instance, this fee was the consideration paid to LFRECC for LFRECC's agreement to lend the money to the plaintiff upon compliance with all the conditions of the commitment. The plaintiff knew all along that (1) the commitment would be conditioned on various items, including approval by the Executive Loan Screening Committee and that (2) the fee was non-refundable. It was a "non-refundable" fee because it was the consideration paid for the issuance of the commitment. The fee was earned, and was given in exchange for the commitment. There was never any question that, if any of the conditions to the commitments were not met, the fee would be retained. The fee was earned at the time the commitment was issued. Nothing further had to be done by LFRECC in order for it to be entitled to it.

It is elementary contract law that a court will not inquire into the adequacy of the consideration. "The slightest consideration is sufficient to support the most onerous obligation; the inadequacy, as has been well said,

## DEFENDANTS' TRIAL MEMORANDUM

is for the parties to consider at the time of the making of the agreement, and not for the Court when it is sought to be enforced." Mandel v. Liebman, 303 N.Y. 88 (1951). In essence, the plaintiff got exactly what it bargained for and the defendant is entitled to keep the money it received for the issuance of the commitment.

Secondly, the defendant LFRECC is entitled to retain the \$180,000 as liquidated damages. The parties to an agreement may agree in advance that a certain sum of money shall be deemed the measure of damages in the event of a breach. The plaintiffs are in breach of the commitments in failing to obtain a permanent take-out. To be sustained, the sum agreed upon as liquidated damages need only be reasonable.

In the situation before this Court, the parties were trying to arrange a \$6,000,000 loan. In transactions of this size, there is competition between lenders to make such loans. As a result of this competition, borrowers have their own bargaining positions vis a vis any

## DEFENDANTS' TRIAL MEMORANDUM

particular lender. The defendant here did not have the leverage to extract an unreasonable fee for its commitments: If the fee were thought to be exorbitant, the plaintiff did not have to accept the commitments. That it did accept them is evidence of the reasonableness of the fee..

Furthermore, it was customary in the real estate lending industry to charge a fee of this size in consideration of the issuance of the commitments. Boston Road Shopping Center, Inc. v. Teachers Insurance and Annuity Association of America, 13 A.D. 2d 106 (1st Dep't 1961) is the leading case on the right of a lender to retain the commitment fee. Boston Road involved an action by a borrower against a lender to recover a \$22,000 commitment fee on a contemplated \$1,100,000 loan. The commitment was conditioned upon the borrower's obtaining acceptable potential lessees of the project. The plaintiff was unable to obtain the lessees. The trial court directed a verdict for the plaintiff on the ground that the plaintiff had made a good faith effort to obtain the tenants. The Appellate Division unanimously reversed the trial court and, in so doing, held that the fee was

## DEFENDANTS' TRIAL MEMORANDUM

reasonable and not oppressive.

"Nothing in the public policy of New York requires the court to strike down this payment in the nature of liquidated damages for a breach of contract by plaintiff. It is entirely reasonable in relation to the nature and extent of defendant's undertaking an arrangement; no oppression or overreaching which might suggest the need for equitable intervention is demonstrated." *ibid* p. 111.

## DEFENDANTS' TRIAL MEMORANDUM

## POINT VII

DEFENDANT IS ENTITLED TO A DIRECTED VERDICT  
AND JUDGMENT ON THE PROMISSORY NOTE

On December 31, 1973, the plaintiff G & S executed a promissory note in the face amount of \$300,000 payable in sixty days. The note was executed by its President, Richard H. Crowe. The plaintiff admits the execution of the note and receipt of the funds. Furthermore, the plaintiff admits receipt of notice of the demand for payment after maturity and admits that only \$50,000 of that sum has been paid.

As a defense to payment of the remaining unpaid principal sum, the plaintiff contends that, by reason of certain alleged representations by the officers of the defendant LFRECC, defendant is estopped from demanding payment and has "waived" the right to demand payment. These defenses are preposterous.

The promissory note executed by G & S is an unconditional, unqualified promise to pay. The time for payment has passed, demand for payment has been made and the plaintiff has not paid. The plaintiff claims that

## DEFENDANTS' TRIAL MEMORANDUM

the note is something other than that which it plainly is, a promissory note: the absurd allegation is made that this loan was the first advance under the LFRECC construction loan. If so, this would be the most unique construction loan ever seen -- there was no construction mortgage; no building contract, no plans or specifications, no title binder; in short, it had none of the earmarks of a real estate loan. It was not even made by or payable to the proposed construction lender, LFRECC, which issued the construction loan commitment.

The argument advanced in defense of payment is without legal merit. Parol evidence of prior or contemporaneous statements contradicting the terms of a written instrument is, as a matter of law, inadmissible. In Leumi Financial Corp. v. Richter, 17 N.Y. 2d 166 (1966) the defendant, on a motion for summary judgment on a promissory note, argued that certain representations regarding the time of payment were made to it at the time the note was executed, which representations allegedly contradicted the written instrument. The New York Court of Appeals held that the plaintiff was entitled to summary judgment.

## DEFENDANTS' TRIAL MEMORANDUM

"The primary question is not whether Spinrad made the statements ascribed to him by defendant Richter (or whether he was authorized to make them). The rule of law which defeats defendants and make this summary judgment valid is that which makes parol evidence inadmissible to vary the terms of a written instrument. Acceptance of defendant's version of the transaction could be accomplished only by letting Richter give oral evidence directly contradicting the clear terms of a written agreement."

The note, which G & S admits signing and receiving the proceeds of, is complete, clear and unambiguous. It is an unqualified promise to pay the money advanced, at maturity. Parol evidence is inadmissible to show that the defendant waived its right to payment or is estopped from demanding payment. What, if anything, could the defendant have done so that the plaintiff is relieved of its obligation to repay the money advanced? There is no question that plaintiff has had the use of this money; plaintiff surely didn't think it was being made a gift of \$300,000.

Additionally, the promissory note provides that "no waiver whatever or modification of the terms hereof shall be valid unless in writing signed by the Bank and then only to the extent therein set forth".

## DEFENDANTS' TRIAL MEMORANDUM

As a result of this language, the General Obligations Law §15-301 (1) prohibits any oral modification, waiver or supplement to the terms of this note unless in writing and signed by the defendant. The plaintiffs have not offered any such writing. Therefore the alleged oral representations, even if made, would be legally ineffectual. Chemical Bank v. Wasserman, 37 N.Y. 2d 249 (1975); Mt. Vernon Trust Co. v. Bergoff, 272 N.Y. 192 (1936).

## DEFENDANTS' TRIAL MEMORANDUM

## POINT VIII

THE GUARANTORS HAVE NO DEFENSE TO  
PAYMENT AND DEFENDANT IS ENTITLED  
TO A DIRECT VERDICT AND JUDGMENT

The promissory note referred to in Point VII herein was unconditionally guaranteed by the individual plaintiffs, Stalnaker and Greskovich. These plaintiffs do not deny the execution of their guarantees or that the money was received. They raise only the same "defenses" as the corporate plaintiff which will already have been discussed.

The same form of guaranty involved in this case was recently litigated in National Bank of Westchester v. Dogwood Construction Corp., 47 A.D. 2d 848 (2nd Dept. 1975). In the Dogwood case, the guarantor of a promissory note raised the defense that certain representations were made to her at the time of her execution of the guaranty which contradicted the terms of the instrument. The Appellate Division ruled that the language of this guaranty was clear and unambiguous and constituted an unconditional promise to pay. As a result, the Court held that extrinsic evidence was inadmissible to vary, contradict or supple-

ment the terms of the guaranty. The Appellate Division held that there were no genuine triable issues of fact raised and granted summary judgment to the plaintiff. Accord: Mount Vernon Trust Co. v. Bergoff, 272 N.Y. 192 (1936).

The rule of Dogwood was even more recently approved by the Court of Appeals in Chemical Bank v. Wasserman, 37 N.Y. 2d 249 (1975), affirming 45 A.D. 2d 703 (1st Dept. 1974). In the Chemical Bank case, the Court of Appeals held that the defendants could not avoid their guaranty to the plaintiff, evidenced by a written instrument, by claiming that there was an oral representation or promise on the part of the plaintiff not to enforce the guaranty according to its terms. The Court stated:

"An oral agreement, however, cannot operate to terminate guarantor's obligation and does not create a triable issue of fact."

The defendant is entitled to a directed verdict and judgment against the individual guarantors on their guaranties.

## DEFENDANTS' TRIAL MEMORANDUM

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CONCLUSION

THE COMPLAINT HEREIN SHOULD BE DISMISSED AS  
TO THE DEFENDANTS AND JUDGMENT ENTERED AGAINST  
THE PLAINTIFFS ON DEFENDANTS' COUNTERCLAIMS

Dated: White Plains, New York  
March 29, 1976

McCARTHY, FINGAR, DONOVAN & GLATTHAAR

By Raymond P. O'Keefe

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DEFENDANTS' REQUESTS TO CHARGE.

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

-----X

G & S DEVELOPMENT CORP., FRANK J.  
GRESKOVICH and BENJAMIN L. STALNAKER,

Index No. 74 Civ. 2451

Plaintiffs,

DEFENDANTS' REQUESTS  
TO CHARGE

-against-

LINCOLN FIRST REAL ESTATE CREDIT CORP.  
and NATIONAL BANK OF WESTCHESTER,

Defendants.

-----X

1. I charge you, as a matter of law, if you find that any conditions to the Commitments dated December 26, 1973 issued by LINCOLN FIRST REAL ESTATE CREDIT CORP. to G & S DEVELOPMENT CORP. have not been fulfilled, then your verdict must be for the defendants.

2. I charge you, that any waiver or satisfaction of the condition to the Commitment requiring the Executive Loan Screening Committee to approve the loan to plaintiffs, must be in writing. If such waiver or satisfaction is not in writing, then your verdict must be for the defendants.

3. I charge you that if you find the Commitment letters of December 26, 1973 constituted valid contracts to lend money and if you find that LFRECC was willing, ready and able to lend if the conditions were met, then you must find that LINCOLN FIRST REAL ESTATE CREDIT CORP. has not breached the contracts.

## DEFENDANTS' REQUESTS TO CHARGE

4. I charge you that if you find the letters of December 26, 1973, constituted binding contracts to lend money and that LINCOLN FIRST REAL ESTATE CREDIT CORP. has breached the contracts, then upon the evidence submitted, you must return a verdict for only nominal damages.

5. If you find that the plaintiff, G & S DEVELOPMENT CORP. paid the defendant LINCOLN FIRST REAL ESTATE CREDIT CORP. \$180,000 in consideration for the issuance of the commitment letters, then I direct that you must find that the defendant is entitled to retain the fee.

6. If you find that the plaintiff, G & S DEVELOPMENT CORP. and LINCOLN FIRST REAL ESTATE CREDIT CORP. agreed that the \$180,000 fee paid was the reasonable pre-estimation of the parties of the amount of damages which LINCOLN FIRST REAL ESTATE CREDIT CORP. would suffer as a result of the failure to make the loan, then I direct you to find that the defendant is entitled to retain this fee as liquidated damages.

7. If you find that there is no written waiver or modification of the \$300,000 promissory note that the plaintiff, G & S DEVELOPMENT CORP. executed in favor of the defendant, NATIONAL BANK OF WESTCHESTER, then I direct you, as a matter of law, to find for the defendant in the amount of \$301,269.09 plus interest from July 1, 1975.

8. If you find that there is no written waiver or modification

DEFENDANTS' REQUESTS TO CHARGE

of the guarantees of the plaintiffs, BENJAMIN L. STALNAKER and FRANK J. GRESKOVICH, then, as a matter of law, I direct you to find for the defendant in the amount of \$301,269.09 plus interest from July 1, 1975.

Dated: White Plains, New York  
March 29, 1976

McCARTHY, FINGAR, DONOVAN & GLATTHAAR

By Raymond P. O'Keefe

Raymond P. O'Keefe  
A Member of the Firm  
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175 Main Street  
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914 946-3700

Service of three (3) copies of  
the within ~~Suppl. Appendix~~ is  
hereby admitted this 17 day

of January 1977

Michael B. Tengert, Wellington Ballinger  
Attorney for ~~my plaintiff~~